

2007

# Ira Sachs v. Joseph S. Lesser, Loeb Investors Co. XL, and United Park City Mines Company, Capital Growth Partners, and John Does 1-10 : Addendum to Brief of Plaintiff and Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

**IRA SACHS,**

**Plaintiff & Appellee,**

**v.**

**JOSEPH S. LESSER, LOEB INVESTORS  
CO. XL, AND UNITED PARK CITY  
MINES COMPANY, CAPITAL GROWTH  
PARTNERS, AND JOHN DOES 1-10,**

**Defendants & Appellants**

Case No. 20070402-~~SA~~  
~~20060257 CA~~  
~~040920707~~

**ADDENDUM TO BRIEF OF PLAINTIFF AND APPELLEE**

**ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS**

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UTAH APPELLATE COURTS

20 2007

**IN THE UTAH SUPREME COURT**

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**IRA SACHS,**

**Plaintiff & Appellee,**

**v.**

**JOSEPH S. LESSER, LOEB INVESTORS  
CO. XL, AND UNITED PARK CITY  
MINES COMPANY, CAPITAL GROWTH  
PARTNERS, AND JOHN DOES 1-10,**

**Defendants & Appellants**

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**Case No. 20070472-SC  
20060257-CA  
040926707**

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**ADDENDUM TO BRIEF OF PLAINTIFF AND APPELLEE**

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## **INDEX TO ADDENDUM**

1. Utah Court of Appeals' opinion in *Sachs v. Lesser*, 2007 UT 169, 163 P.2d 662
2. The Utah Real Estate Brokers Act ("UREBA"), §61-2-1 *et. seq.*, (2005)
3. Provisions of current and prior versions of UREBA containing definitions of "business opportunity" and "real estate"
4. Utah statute of frauds, §25-5-4 (2004)
5. Utah R.Civ.P. 56
6. Utah Code Ann. §61-2-5.5, as amended (2001)
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Tab 1

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Sachs v. Lesser  
Utah App., 2007.

Court of Appeals of Utah.  
Ira SACHS, Plaintiff and Appellant,  
v.  
Joseph S. LESSER, Loeb Investors Co. XL, United  
Park City Mines Company, Capital Growth  
Partners, and John Does 1-10, Defendants and  
Appellees.  
**No. 20060257-CA.**

May 17, 2007.

**Background:** Shareholder brought breach of contract action against company, its president, and the chairman of the board of directors, seeking to collect a finder's fee for finding buyer for all of company's stock. The District Court, Salt Lake Department, Tyrone E. Medley, J., granted defendants summary judgment. Shareholder appealed.

**Holdings:** The Court of Appeals, McHugh, J., held that:

- (1) no express contract formed between the parties due to a lack of a meeting of the minds as to the amount of compensation;
- (2) genuine issues of material fact existed as to whether there was a contract implied in fact, precluding summary judgment;
- (3) shareholder was not required to comply with the Real Estate Broker's Act's licensing requirements in finding stock buyer; and
- (4) statute of frauds did not apply to alleged finder's agreement.

Affirmed in part and reversed and remanded in part.  
West Headnotes

**[1] Contracts 95** **15**

95 Contracts  
95I Requisites and Validity  
95I(B) Parties, Proposals, and Acceptance  
95k15 k. Necessity of Assent. Most Cited Cases  
A binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms.

**[2] Contracts 95** **9(1)**

95 Contracts  
95I Requisites and Validity  
95I(A) Nature and Essentials in General  
95k9 Certainty as to Subject-Matter  
95k9(1) k. In General. Most Cited Cases  
A contract can be enforced only if the obligations of the parties are set forth with sufficient definiteness that it can be performed.

**[3] Contracts 95** **9(1)**

95 Contracts  
95I Requisites and Validity  
95I(A) Nature and Essentials in General  
95k9 Certainty as to Subject-Matter  
95k9(1) k. In General. Most Cited Cases  
Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.

**[4] Brokers 65** **7**

65 Brokers  
65II Employment  
65k7 k. Appointment or Employment. Most Cited Cases

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Generally, material terms of a broker or finder's agreement include, but are not necessarily limited to: (1) a description of the performance required of the finder or broker, and (2) the amount of commission or fee to be paid for the completed performance.

#### **[5] Brokers 65 ⇨40**

##### **65 Brokers**

##### **65V Compensation**

##### **65k40 k. Employment of Broker. Most Cited**

##### **Cases**

Shareholder and chairman of company's board of directors never reached a meeting of the minds as to the amount of compensation shareholder would be due if he succeeded in finding a buyer for the company, and thus, no express contract formed between the parties.

#### **[6] Contracts 95 ⇨27**

##### **95 Contracts**

##### **95I Requisites and Validity**

##### **95I(B) Parties, Proposals, and Acceptance**

##### **95k27 k. Implied Agreements. Most Cited**

##### **Cases**

#### **Implied and Constructive Contracts 205H ⇨30**

##### **205H Implied and Constructive Contracts**

##### **205HI Nature and Grounds of Obligation**

##### **205HI(C) Services Rendered**

##### **205Hk30 k. Work and Labor in General; Quantum Meruit. Most Cited Cases**

#### **Implied and Constructive Contracts 205H ⇨55**

##### **205H Implied and Constructive Contracts**

##### **205HI Nature and Grounds of Obligation**

##### **205HI(D) Effect of Express Contract**

##### **205Hk55 k. In General. Most Cited Cases**

Recovery under quantum meruit presupposes that no enforceable contract exists, and can take either of two forms; the first is a claim for a contract implied in fact, which is an actual contract established by conduct, while the second, is a claim for a contract implied in law or quasi-contract, which is not a contract at all, but rather an action in

restitution.

#### **[7] Contracts 95 ⇨27**

##### **95 Contracts**

##### **95I Requisites and Validity**

##### **95I(B) Parties, Proposals, and Acceptance**

##### **95k27 k. Implied Agreements. Most Cited**

##### **Cases**

Like express contracts, contracts implied in fact grow out of the intention of the contracting parties and in each case there must be a meeting of the minds before there can be a contract.

#### **[8] Contracts 95 ⇨27**

##### **95 Contracts**

##### **95I Requisites and Validity**

##### **95I(B) Parties, Proposals, and Acceptance**

##### **95k27 k. Implied Agreements. Most Cited**

##### **Cases**

Unlike an express contract, recovery under a contract implied in fact does not necessarily require that the parties agree on the contract price.

#### **[9] Contracts 95 ⇨27**

##### **95 Contracts**

##### **95I Requisites and Validity**

##### **95I(B) Parties, Proposals, and Acceptance**

##### **95k27 k. Implied Agreements. Most Cited**

##### **Cases**

To prevail on a claim arising under a contract implied in fact, a plaintiff must show: (1) the defendant requested the plaintiff to perform the work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation.

#### **[10] Contracts 95 ⇨29**

##### **95 Contracts**

##### **95I Requisites and Validity**

##### **95I(B) Parties, Proposals, and Acceptance**

##### **95k29 k. Questions for Jury. Most Cited**

##### **Cases**

Generally speaking, the existence of an implied-in-fact contract is a factual question

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committed to the sound discretion of the jury.

#### [11] Appeal and Error 30 ⚡863

##### 30 Appeal and Error

###### 30XVI Review

###### 30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases  
On a review of summary judgment on a contract implied in fact claim, the reviewing court retains the power to decide whether, as a matter of law, a reasonable jury could find that an implied contract exists.

#### [12] Contracts 95 ⚡27

##### 95 Contracts

###### 95I Requisites and Validity

###### 95I(B) Parties, Proposals, and Acceptance

###### 95k27 k. Implied Agreements. Most Cited Cases

#### Contracts 95 ⚡168

##### 95 Contracts

###### 95II Construction and Operation

###### 95II(A) General Rules of Construction

###### 95k168 k. Terms Implied as Part of Contract. Most Cited Cases

On a contract implied in fact claim, a plaintiff may only recover the amount the parties can be said to have reasonably intended as the contract price; if the parties have left that amount unexpressed, courts will infer the amount to be the reasonable value of the plaintiff's services.

#### [13] Judgment 228 ⚡181(31)

##### 228 Judgment

###### 228V On Motion or Summary Proceeding

###### 228k181 Grounds for Summary Judgment

###### 228k181(15) Particular Cases

228k181(31) k. Stock and Stockholders, Cases Involving. Most Cited Cases  
Genuine issues of material fact existed as to whether there was a contract implied in fact

between shareholder and chairman of company's board of directors and whether shareholder was responsible for procuring buyer for company, precluding summary judgment on shareholder's claim for a finder's fee based on the implied contract to find buyer for company.

#### [14] Brokers 65 ⚡53

##### 65 Brokers

###### 65V Compensation

###### 65k47 Sufficiency of Services of Broker

###### 65k53 k. Procuring Cause of Contract or Transaction. Most Cited Cases

A business finder becomes entitled to his fee if his introduction results in a transaction, irrespective of whether a third person brings the parties to agreement.

#### [15] Brokers 65 ⚡53

##### 65 Brokers

###### 65V Compensation

###### 65k47 Sufficiency of Services of Broker

###### 65k53 k. Procuring Cause of Contract or Transaction. Most Cited Cases

With a business finder, the causation, or procuring cause requirement for obtaining a finder's fee is satisfied by the mere introduction, even if negotiations are abandoned and later successfully resumed, provided the renewed negotiations are connected to and stem from the original introduction.

#### [16] Brokers 65 ⚡2

##### 65 Brokers

###### 65I Regulation and Conduct of Business in General

###### 65k2 k. Who Are Brokers. Most Cited Cases

A "broker" not only introduces the parties to a business opportunity but also negotiates on behalf of one of the parties with the best interests of one such party being his charge.

#### [17] Brokers 65 ⚡54

##### 65 Brokers

###### 65V Compensation

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65k47 Sufficiency of Services of Broker

65k54 k. Ability and Willingness of Party  
Procured to Perform Contract. Most Cited Cases  
A broker becomes entitled to his commission if,  
through his direct and continuous actions, he  
produces a buyer or seller who is ready, willing, and  
able to complete the transaction on the principal's  
terms.

### [18] Corporations 101 ↪1.3

101 Corporations

101I Incorporation and Organization

101k1.3 k. Distinct Entity in General,  
Corporation As. Most Cited Cases

### Corporations 101 ↪182.1(1)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to  
Corporation

101k182 Corporate Property, Funds, and  
Securities

101k182.1 In General

101k182.1(1) k. Title and Rights in  
General. Most Cited Cases

Because a corporation exists as a distinct legal  
entity, when the corporation acquires property, the  
title vests in it as a separate entity distinct from its  
shareholders.

### [19] Corporations 101 ↪182.1(3)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to  
Corporation

101k182 Corporate Property, Funds, and  
Securities

101k182.1 In General

101k182.1(3) k. Individual  
Conveyance or Assignment. Most Cited Cases  
When a stockholder sells his stock, he is selling his  
proprietary interest in a going concern and not an  
interest in the corporate assets. West's U.C.A. §  
16-10a-102(33).

### [20] Corporations 101 ↪445.1

101 Corporations

101XI Corporate Powers and Liabilities

101XI(C) Property and Conveyances

101k441 Conveyances by Corporations

101k445.1 k. Assumption of  
Transferor's Liabilities. Most Cited Cases  
Generally speaking, when all the assets of an  
ongoing business are purchased, the purchaser does  
not acquire the liabilities of the corporation as a  
stock purchaser would.

### [21] Corporations 101 ↪182.1(1)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to  
Corporation

101k182 Corporate Property, Funds, and  
Securities

101k182.1 In General

101k182.1(1) k. Title and Rights in  
General. Most Cited Cases

### Corporations 101 ↪182.4(1)

101 Corporations

101IX Members and Stockholders

101IX(A) Rights and Liabilities as to  
Corporation

101k182 Corporate Property, Funds, and  
Securities

101k182.4 Sale or Transfer of Assets

101k182.4(1) k. In General. Most  
Cited Cases

The purchaser in a corporate asset transaction takes  
legal title to the property, but in a stock purchase  
transaction the corporation's assets remain titled in  
the corporation's name.

### [22] Brokers 65 ↪3

65 Brokers

65I Regulation and Conduct of Business in  
General

65k3 k. Licenses and Taxes. Most Cited Cases  
Shareholder did not find a participant in a business  
opportunity involving real property when he located  
a buyer for all of company's stock, which company  
existed for the sole purpose of owning and dealing

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in real estate, and thus, he was not required to comply with the Real Estate Broker's Act's licensing requirements; the stock buyer gained only a proprietary interest in a going concern and not an interest in the company's real property since the company continued to own, possess, and control the real property throughout and following the merger transaction. West's U.C.A. §§ 61-2-2(14), 61-2-18.

### [23] Brokers 65 ↩3

#### 65 Brokers

##### 65I Regulation and Conduct of Business in General

65k3 k. Licenses and Taxes. Most Cited Cases  
Agreements to broker corporate stock for compensation do not fall within the scope of statute of frauds provision regarding broker agreements to sell real estate. West's U.C.A. § 25-5-4(1)(e).

### [24] Brokers 65 ↩43(2)

#### 65 Brokers

##### 65V Compensation

##### 65k43 Necessity of Contract in Writing

65k43(2) k. Under Special Statutes  
Relating to Brokers. Most Cited Cases  
Company's stock was considered personal property rather than realty, and thus, alleged agreement between shareholder and company, in which shareholder would receive finder's fee if he found a buyer for all of company's stock, was not subject to the statute of frauds. West's U.C.A. § 25-5-4(1)(e).

\*665 Kathryn Collard, Salt Lake City, for Appellant.  
Laura S. Scott, Shane D. Hillman, Jason D. Boren,  
and Anthony C. Kaye, Salt Lake City, for Appellees.

Before BENCH, P.J., McHUGH and THORNE, JJ.

### OPINION

McHUGH, Judge:

¶ 1 Plaintiff Ira Sachs appeals the district court's order granting summary judgment to Defendants Joseph S. Lesser, Loeb Investors Co. XL, and United Park City Mines Company on Sachs's claims to recover a finder's fee. We affirm in part and reverse and remand in part.

### BACKGROUND

FN1. We note that many of the facts are hotly disputed. When "there is a factual dispute, we view the facts in the light most favorable to the nonmoving party," *Quaid v. U.S. Healthcare, Inc.*, 2007 UT 27, ¶ 8, 158 P.3d 525, in this instance, Sachs; and "[w]e recite the facts accordingly," *Sanders v. Leavitt*, 2001 UT 78, ¶ 1 n. 1, 37 P.3d 1052.

¶ 2 This appeal arises from a dispute over Sachs's claim to a finder's fee for a transaction culminating in the purchase of all the outstanding stock of United Park City Mines (UPCM) by Capital Growth Partners, L.L.C. (Capital). At the time these events began in 1999, UPCM was a publicly held corporation involved in the leasing, development, and sale of real property located in and around Park City, Utah. Loeb Investors Co. XL (Loeb) was the controlling shareholder of UPCM, and Defendant Joseph S. Lesser served as both the Chairman of the Board of Directors of UPCM and President of Loeb. Hank Rothwell was the President of UPCM. Sachs was a shareholder in UPCM and worked as a business consultant in Park City.

¶ 3 In 1999, UPCM, acting under Rothwell's direction, entered into a letter of understanding with DMB Associates, Inc. (DMB), to form a joint venture to develop resort projects in Park City on a portion of UPCM's property.<sup>FN2</sup> The joint venture formed in June 2000. After attempts to agree on a business plan failed, the joint venture dissolved in January 2001, leaving UPCM obligated to pay DMB approximately \$2.5 million in development costs and accrued interest.

FN2. UPCM's only significant corporate asset is its real property holdings which include more than 8300 acres of land, of which approximately 5300 are leased to Deer Valley and Park City Mountain Resorts for skiing and related purposes.

¶ 4 Upon learning that the joint venture between

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UPCM and DMB had failed, Sachs contacted one of his clients, Granite Land Company (Granite), and introduced Granite to UPCM as a potential joint venturer to take the place of DMB in developing the resort projects. Around March 2001, Granite and UPCM signed a confidentiality agreement allowing them to exchange information related to a possible joint venture.

¶ 5 On May 2, 2001, Sachs traveled to New York to meet with Lesser, the chairman of UPCM's board of directors. At the meeting, Lesser expressed his displeasure regarding Rothwell's handling of the failed UPCM joint venture with DMB. Lesser indicated that he represented eighty-five percent of UPCM's shareholders, and that those shareholders had lost faith in Rothwell and did not want to invest any more money in UPCM. Lesser then asked Sachs to locate a joint venturer or purchaser for UPCM as quickly as possible, regardless of whether it was Granite, another party, or a combination. Although no specific amount of a finder's fee was discussed at the meeting, Lesser told Sachs that UPCM intended to engage Dresdner Kleinwort Wasserstein, Inc. (Dresdner) as a broker and that Sachs would not be entitled to a commission if Dresdner found a buyer for UPCM. During the conversation, Lesser did not mention or exclude any other persons or entities that could be approached as potential joint venturers or purchasers for UPCM aside from Dresdner and its contacts.

¶ 6 Following his meeting with Lesser, Sachs sent a letter to Rothwell on May 17, 2001, memorializing aspects of the New York \*666 meeting. The letter included a reference to Sachs's expectation of a finder's fee for his services in locating a joint venturer for UPCM. The letter stated:

I am delighted that my introducing [UPCM] to Granite ... appears to be headed in the right direction and I am pleased that the confidentiality letter has been signed. I certainly will continue to do everything in my power to bring together a mutually satisfactory agreement between these two parties. I took the opportunity to express this commitment to your chairman, [Lesser], ... in early May.

....

In that lunch with [Lesser], I was delighted to find that he seems to share our enthusiasm for this joint venture. I hope that this feeling is generally shared by the rest of your board.... [Lesser] gave me his encouragement to "get the job done."

I write this letter to remind you that I will expect a modest finder's fee if an agreement comes to fruition. This could be cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us. While I believe we have an understanding as to this finder's fee, I do think that matters of this sort ought to be out on the table early on, and I hope you feel the same.

Please let me know if you have any questions concerning such finder's fee.

Later that same day, Rothwell transmitted the letter to Lesser. Lesser telephoned and informed Sachs that he did not want a joint venture partner for UPCM but was, instead, only interested in a purchaser.

¶ 7 The next day, Sachs followed up on this telephone conversation by sending a second letter to Rothwell clarifying Lesser's preference for a purchaser. The second letter stated:

I understand, after a conversation yesterday with [Lesser], that his preference would be to sell the company rather than enter into a joint venture....

Happily, if your company's preference is sale, Granite, as I suggested in yesterday's letter is still an excellent prospect. Another investor, together with Granite, would make an excellent purchaser. I am happy to re-direct my focus to obtaining such a joint venture purchaser.

Obviously, I will keep you apprised of all proposals, whether for sale or for a joint venturing of the project.

¶ 8 During this time, Sachs was also contacting several individuals regarding the purchase of UPCM. One of those people was Gerald Jackson, a real estate developer who had previously worked in Park City. During their initial conversation, Sachs conveyed to Jackson what he had learned from Lesser in New York, including Lesser's disappointment with Rothwell and Lesser's strong

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desire to sell UPCM instead of enter into a joint venture. Jackson thanked Sachs for the information and expressed interest in buying UPCM. Jackson told Sachs that he would like to "take [the UPCM] deal down with some institutional and other investors." Because Lesser had told Sachs that all interested parties should be referred to Rothwell, Sachs asked Jackson to contact Rothwell. Sachs also suggested that Jackson sign a confidentiality agreement so that Jackson could obtain information relevant to the purchase of UPCM and would be registered as one of Sachs's contacts. In addition, Sachs invited Jackson to contact Granite and offered to inquire whether Granite was interested in joining Jackson in a bid to purchase UPCM. During this initial conversation, Jackson never informed Sachs that he was already acquainted with Rothwell through prior business and social relationships or that he was already pursuing a purchase of UPCM directly with Rothwell. Rather, Jackson told Sachs that he would contact Rothwell and sign a confidentiality agreement.

¶ 9 Shortly thereafter, Sachs contacted Rothwell and informed him of Jackson's interest in putting together a group of investors to purchase UPCM. Sachs told Rothwell that Jackson became interested in purchasing UPCM upon learning from Sachs that Lesser was eager to sell. During this conversation, Rothwell never mentioned that he and Jackson were already engaged in negotiations concerning the sale of UPCM. As promised, Sachs also contacted Granite about \*667 the possibility of affiliating with Jackson to purchase UPCM. And Jackson, acting on Sachs's suggestion, also contacted Granite.

¶ 10 On June 4, 2001, Sachs wrote to Jackson asking to be updated when Jackson contacted Rothwell or entered into a confidentiality agreement with UPCM. Jackson responded by telephoning and informing Sachs that he had already contacted Rothwell. On July 9, 2001, Jackson, acting through Aspen Ranch Corp., entered into a confidentiality agreement with Dresdner, who by that time was UPCM's investment banking firm. On July 31, 2001, Jackson helped form Capital, a Utah limited liability company, for the express purpose of purchasing UPCM.

¶ 11 From late July 2001, through the end of the year, Sachs frequently inquired about Jackson's progress in purchasing UPCM; however, Sachs was not personally involved in negotiating the deal. In late October 2001, Capital entered into a non-disclosure agreement with Dresdner to pursue a proposed acquisition of all the outstanding shares of UPCM. Four months later, Capital formally offered to purchase UPCM from its current shareholders. After reading a newspaper article about the offer, Sachs sent a facsimile to Rothwell which stated "completion of task."

¶ 12 About this time, in February 2002, Jackson telephoned Sachs and discussed Sachs's role in soliciting Jackson as a purchaser for UPCM. Jackson confirmed that Sachs was responsible for introducing Jackson to the deal and also stated that he had no problem with Sachs receiving a finder's fee on the transaction. Following this conversation with Jackson, Sachs began contacting Rothwell and Craig Terry, an attorney for UPCM, in an attempt to secure payment of a finder's fee for the transaction.

¶ 13 In June 2003, Capital purchased all the outstanding common stock of UPCM, by way of merger with its wholly owned subsidiary, CGP Acquisition, Inc. In the merger, UPCM, the surviving corporation, became a wholly owned subsidiary of Capital and retained all of its assets and liabilities, including its real estate assets. Following the completion of the transaction, Sachs continued to seek a finder's fee from UPCM. On August 11, 2003, Sachs again spoke with Jackson who expressed surprise that Dresdner received a finder's fee for the transaction instead of Sachs. Jackson reiterated that Sachs, and not Dresdner, had solicited him as a purchaser. Shortly after this exchange, Sachs faxed additional requests for payment to Rothwell at UPCM. Rothwell eventually returned a facsimile with a notation that stated: "Ira [Sachs]-[UPCM] does not agree with your agency argument. [Jackson] and I had discussed [UPCM] for years! We viewed you as a representative of Granite ... only!"<sup>FN3</sup>

FN3. In his deposition testimony, Lesser conceded that if Sachs had been



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responsible for introducing Jackson to UPCM, Sachs would have been entitled to a finder's fee.

¶ 14 In January 2004, Sachs brought suit against Lesser, Loeb, UPCM, and Capital in an effort to collect a finder's fee for the sale of UPCM to Capital. Among other things, Sachs alleged breach of an express oral contract or, in the alternative, recovery under theories of contract implied in fact and contract implied in law.<sup>FN4</sup> Lesser, Loeb, and UPCM (collectively Defendants) moved for summary judgment.<sup>FN5</sup> The trial court granted Defendants' motion, finding the undisputed facts did not support Sachs's claim for breach of an express finder's fee agreement because there was no meeting of the minds on the essential terms of the contract, including the amount of the fee. The trial court found that Sachs's claim for contract implied in fact similarly failed for a lack of definiteness.\*668 Turning to Sachs's claim for contract implied in law, the trial court determined that Utah's statutes relating to the licensing of real estate brokers, *see* Utah Code Ann. §§ 61-2-1 to -27 (2006) (UREBA), and Utah's statute of frauds, *see* Utah Code Ann. §§ 25-5-1 to -9 (1998 & Supp.2006), barred Sachs's claim.<sup>FN6</sup> The trial court concluded that because Sachs was not a licensed real estate broker in Utah and there was no written memorandum of the parties' agreement, any claim for a finder's fee was barred by both UREBA and the statute of frauds as a matter of law. Sachs appealed.

FN4. Although the trial court refers to Sachs's contract implied in law claim as a claim for quantum meruit, we use the term "quantum meruit" to refer to both branches of that doctrine: 1) contract implied in fact; and 2) contract implied in law. *See Scheller v. Dixie Six Corp.*, 753 P.2d 971, 975 (Utah Ct.App.1988). We refer to the theories individually when only one is relevant to the discussion.

FN5. Capital was granted summary judgment on the ground that the undisputed facts could not support Sachs's claim for corporate successor liability.

Sachs does not appeal this determination; we therefore limit our review to the claims against Defendants.

FN6. The trial court also determined that Sachs's claims for breach of express contract and recovery under contract implied in fact were similarly barred by UREBA and the statute of frauds.

#### ISSUE AND STANDARD OF REVIEW

¶ 15 Sachs argues that the trial court erred in granting Defendants' motions for summary judgment. "Summary judgment is appropriate only where (1) 'there is no genuine issue as to any material fact' and (2) 'the moving party is entitled to a judgment as a matter of law.'" *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439 (quoting Utah R. Civ. P. 56(c)). Therefore, "[w]e review the district court's decision to grant summary judgment for correctness, granting no deference to the [district] court." *Swan Creek Vill. Homeowners Ass'n v. Warne*, 2006 UT 22, ¶ 16, 134 P.3d 1122 (second alteration in original) (quotations omitted).

#### ANALYSIS

¶ 16 On appeal, Sachs alleges multiple points of error. First, Sachs argues that summary judgment was inappropriate because material issues of fact remain unresolved with respect to his claims for express oral contract and contract implied in fact. Next, Sachs contends that the trial court erred when it determined that UREBA applied to an acquisition of all of UPCM's outstanding stock thereby barring his express oral contract, contract implied in fact, and contract implied in law. Finally, Sachs asserts the trial court erred when it concluded that the statute of frauds barred his claims. We affirm in part and reverse and remand in part.

#### I. Express Contract

¶ 17 Sachs argues that the trial court erred when it dismissed his express contract claim on the ground that no meeting of the minds occurred on the

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material terms of the contract. We affirm.

[1][2][3] ¶ 18 “A binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms. Furthermore, a contract can be enforced ... only if the obligations of the parties are set forth with sufficient definiteness that it can be performed.” *Bunnell v. Bills*, 13 Utah 2d 83, 368 P.2d 597, 600 (1962) (footnote omitted), *overruled on other grounds by Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982); *see also Carter v. Sorenson*, 2004 UT 33, ¶ 7, 90 P.3d 637 (“A contract ... must have definite terms ... or else it cannot be enforced by a court.”). “[W]here a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.” *Stangl v. Todd*, 554 P.2d 1316, 1319 (Utah 1976); *see also Utah Golf Ass’n v. City of N. Salt Lake*, 2003 UT 38, ¶ 13, 79 P.3d 919 (“An unenforceable agreement to agree occurs when parties to a contract fail to agree on material terms of the contract ‘with sufficient definiteness to be enforced.’ ” (emphasis added) (quoting *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 502 (Utah 1988))).

[4] ¶ 19 Generally, material terms of a broker or finder's agreement include, but are not necessarily limited to: (1) a description of the performance required of the finder or broker, and (2) the amount of commission or fee to be paid for the completed performance. *See Case v. Ralph*, 56 Utah 243, 188 P. 640, 642 (1920) (recognizing that material terms of a finder or broker's agreement include “the terms and conditions of his employment, if any, and the amount of his commission, etc.”); *C.J. Realty, Inc. v. Willey*, 758 P.2d 923, 928 (Utah Ct.App.1988) (outlining “critical terms of a finder's agreement” to include “the finder, the finder's clients, the \*669 property owner who will owe a commission to the finder if a transaction is closed with any of the finder's clients, and the commission rate”).

[5] ¶ 20 Here, summary judgment was appropriate because the parties did not reach a meeting of the minds as to the amount of compensation due should Sachs succeed in finding a buyer for UPCM. *See*

*Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 290-91 (Utah Ct.App.1994) (recognizing, implicitly, that the amount of a finder's fee is an essential term of a finder's contract and determining that the parties' agreement on a “reasonable” fee would be sufficiently definite to enforce where prior contract and future contract gave guidance as to what the parties considered reasonable). Although it is undisputed that Sachs sent a letter on May 17, 2001, indicating his willingness to accept “a modest finder's fee” in the form of “cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both [parties,]” Sachs has failed to point to any facts that could support his contention that the parties actually agreed to the “modest” fee or to any other specific form or amount of compensation. Rather, it is undisputed that at the May 2, 2001 meeting, Sachs and Lesser did not discuss any specific amount of finder's fee. Additionally, Sachs admits that he did not have any specific compensation in mind when he drafted the letter and instead “was trying to draw [Rothwell] out to come up with something.” It is also undisputed that, following the letter, the parties never agreed to the form or a specific amount of compensation. Therefore, Sachs's express contract claim fails as a matter of law because there was no meeting of the minds on the essential term of the fee to be paid.<sup>FN7</sup>

FN7. Sachs also argues that the May 17 letter was a written offer that Lesser accepted when he told Sachs to find a buyer, not a joint venturer. We disagree. “A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.” Restatement (Second) Contracts § 26 (1981).

## II. Contract Implied in Fact

[6] ¶ 21 We now turn to the question of whether summary judgment was proper on Sachs's contract implied in fact claim. “Recovery under quantum

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meruit presupposes that no enforceable contract exists,” and can take either of two forms. *Scheller v. Dixie Six Corp.*, 753 P.2d 971, 975 (Utah Ct.App.1988). The first is a claim for a contract implied in fact, which “is an actual contract established by conduct.” *Id.* The second, is a claim for a contract implied in law or “quasi-contract,” which is “not a contract at all, but rather an action in restitution.” *Id.*

¶ 22 The trial court granted summary judgment on Sachs's contract implied in fact claim on the same ground it disposed of the express contract claim—that there was no meeting of the minds on the essential terms of a finder's fee agreement. Sachs argues that the trial court erred because it is not necessary, under a contract implied in fact theory, to prove a meeting of the minds on each essential term of a finder's fee agreement. We agree.

[7][8][9] ¶ 23 Like express contracts, contracts implied in fact “grow out of the intention of the contracting parties and in each case there must be a meeting of the minds before there can be a contract.” *Morgan v. Board of State Lands*, 549 P.2d 695, 696 n.1 (Utah 1976) (plurality) (quotations omitted). However, unlike an express contract, recovery under a contract implied in fact does not necessarily require that the parties agree on the contract price. See *Davies v. Olson*, 746 P.2d 264, 267-69 (Utah Ct.App.1987) (allowing recovery under contract implied in fact where express contract claim was defeated for failure to show a meeting of the minds as to contract price). Instead, to prevail on a claim arising under a contract implied in fact, a plaintiff must show: “(1) the defendant requested the plaintiff to perform the work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation.” *Scheller*, 753 P.2d at 975; *accord Davies*, 746 P.2d at 269.

\*670 [10][11] ¶ 24 Generally speaking, “[t]he existence of an implied-in-fact contract is a factual question committed to the sound discretion of the jury.” *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 306 (Utah 1992). However, on a review of summary judgment, the court “retains the power

to decide whether, as a matter of law, a reasonable jury could find that an implied contract exists.” *Id.*; *accord Knight v. Salt Lake County*, 2002 UT App 100, ¶ 6, 46 P.3d 247. Under this standard, summary judgment is appropriate only where “a reasonable jury cannot find that an implied contract exists.” *Sanderson*, 844 P.2d at 306.

[12][13] ¶ 25 Here, there are disputed facts as to whether there was a contract implied in fact.<sup>FN8</sup> On two occasions, Lesser requested Sachs to find a buyer for UPCM.<sup>FN9</sup> The first time, at the meeting in New York and second when Lesser admonished Sachs that he wanted a buyer, not a joint venturer. Further, Sachs clearly expected to be compensated for his services and both UPCM and Loeb knew or should have known that. Sachs directly apprised UPCM of his expectation of a modest finder's fee when he sent the letter to Rothwell, the president of UPCM, on May 17, 2001. The letter, which specifically stated that “[I], Sachs,] will expect a modest finder's fee if an agreement comes to fruition,” was transmitted to Lesser; so, it can be inferred that Lesser was also aware that Sachs expected a fee. When viewing these facts in a light most favorable to Sachs, as we must, see *Quaid v. U.S. Healthcare, Inc.*, 2007 UT 27, ¶ 8, 158 P.3d 525, we cannot say that no reasonable jury could find that an implied-in-fact contract exists. Thus, the issue should not have been “take[n] from the jury” where, as here, “there is ... evidence upon which a reasonable jury could infer” the truth of the claim. *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1293 (Utah Ct.App.1996).

FN8. Even if Sachs should prevail on his contract implied in fact claim, he may only recover “the amount the parties can be said to have reasonably intended as the contract price.” *Scheller*, 753 P.2d at 975. If “the parties have left that amount unexpressed, courts will infer the amount to be the reasonable value of the plaintiff's services.”

*Id.* If the trial court reaches the question of reasonable value, it should consider, among other things, that Sachs testified that he spent no more than ten hours identifying Jackson as a buyer for UPCM.

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FN9. We continue to state the facts in the light most favorable to Sachs, the non-moving party, *see Sanders*, 2001 UT 78 at ¶ 1 n. 1, 37 P.3d 1052, but note that there are disputed questions of fact as to whether Lesser was acting in his capacity as the Chairman of the Board of UPCM, President of Loeb, or both, or neither, when he requested that Sachs find a buyer for UPCM.

¶ 26 Defendants argue alternatively that we should affirm the trial court's summary judgment in favor of Defendants on Sachs's express and implied-in-fact contract claims because Sachs cannot prove that he was responsible for procuring Jackson as a buyer of UPCM. Because the role of a finder is much more limited than that of a broker, we disagree.

[14][15] ¶ 27 A "finder" is one who, for a fee, "find[s], introduce[s] and bring[s] together parties to a business opportunity, leaving ultimate negotiations and consummation of [the] business transaction to the principals." Black's Law Dictionary 437 (abridged 6th ed.1991); *see also Legros v. Tarr*, 44 Ohio St.3d 1, 540 N.E.2d 257, 263 (1989). A business finder, therefore, becomes entitled to his fee "if his introduction results in a transaction, irrespective of whether a third person brings the parties to agreement." *Legros*, 540 N.E.2d at 262; *see also Amerofina, Inc. v. U.S. Indus., Inc.*, 232 Pa.Super. 394, 335 A.2d 448, 452 (1975); *cf. Diversified Gen. Corp. v. White Barn Golf Course*, 584 P.2d 848, 850 (Utah 1978) (noting that depending on the terms of the agreement, a broker may "be required to effect a sale or merely produce a customer" (emphasis added)); *C.J. Realty, Inc. v. Willey*, 758 P.2d 923, 925 n. 1 (Utah Ct.App.1988) (holding recovery of commission possible where agreement required only that finder supply list of purchasers, one of whom buys property).<sup>FN10</sup>

FN10. With a finder, "the causation, or 'procuring cause' requirement is satisfied by the mere introduction, even if negotiations are abandoned and later

successfully resumed, provided the renewed negotiations are connected to and stem from the original introduction." *Legros v. Tarr*, 44 Ohio St.3d 1, 540 N.E.2d 257, 263 (1989); *see also Amerofina, Inc. v. U.S. Indus., Inc.*, 232 Pa.Super. 394, 335 A.2d 448, 453 (1975) ("[I]f a finder introduces a prospective buyer and seller who enter upon merger negotiations which are suspended and later resumed, the finder is still entitled to a fee if the renewed negotiations ... directly result from the original introduction." (second alteration in original) (quotations omitted)).

\*671 [16][17] ¶ 28 Conversely, a broker "not only introduces the parties but also negotiates on behalf of one of the parties with the best interests of one such party being his charge." *Legros*, 540 N.E.2d at 262. A broker becomes entitled to his commission if, through his direct and continuous actions, he produces a buyer or seller who is ready, willing, and able to complete the transaction on the principal's terms. *See Butterfield v. Consolidated Fuel Co.*, 42 Utah 499, 132 P. 559, 561 (1913) ("Before the broker can be said to have earned his commissions, he must produce a purchaser who is ready and willing to enter into a contract upon his employer's terms." (quotations omitted)); *see also Amerofina*, 335 A.2d at 453 ("In the brokerage case the broker must be the procuring cause of a ready, willing [,] and able buyer who purchases on the terms and at the price designated by the principal.").

¶ 29 Therefore, while both finders and brokers must demonstrate that they are the "procuring cause" of the transaction to recover their fee or commission, the term "procuring cause" has different meanings with respect to finders and brokers. These distinctions are important here because Sachs need only demonstrate that he introduced the parties who eventually consummated the transaction. *See Link-Hellmuth, Inc. v. Carey*, 101 Ohio App.3d 604, 656 N.E.2d 358, 362 (1995) (noting that "[i]t is possible for a finder to accomplish his service by making only two phone calls and, if the parties later conclude a deal, he is entitled to his commission"); *cf. Frederick May &*

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*Co. v. Dunn*, 13 Utah 2d 40, 368 P.2d 266, 269 (1962) ("The fact that the sale was consummated without participation by the [middleman] in the final negotiation does not preclude him from recovering his commission if the sale was otherwise procured by him.").

¶ 30 Sachs's deposition testimony places in dispute whether, as a finder, he was the procuring cause of the sale of UPCM to Capital. *See Nyman v. McDonald*, 966 P.2d 1210, 1213 (Utah Ct.App.1998) (" 'One sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding summary judgment.' Such sworn statements include deposition testimony that is before the trial court on summary judgment." (alteration in original) (citation omitted)). Although it is undisputed that Jackson and Rothwell were acquainted, both professionally and socially, before the sale of UPCM to Capital, and that they both have testified that Rothwell introduced Jackson to the deal, Sachs has identified additional disputed facts that place Jackson's and Rothwell's testimonies into question. These facts, if believed, could support a finding that Sachs was the procuring cause of the transaction.

¶ 31 First, Sachs claims that he independently developed proprietary information through correspondence and dialogue with Rothwell and Lesser that UPCM was for sale, not merely seeking joint venture partners, and that Lesser was dissatisfied with Rothwell's management of UPCM. Sachs conveyed this information to Jackson who expressed an interest in purchasing UPCM. Sachs then urged Jackson to contact Rothwell at UPCM, sign a confidentiality agreement, and register as Sachs's contact. During their initial conversation, Jackson never informed Sachs that he was already pursuing the deal directly with Rothwell. Sachs's deposition testimony also outlines persistent correspondence, by telephone, fax, and letter, with Jackson from before execution of the confidentiality agreement until after completion of the merger.

¶ 32 Additionally, neither Jackson nor Rothwell have produced or recall any documentary evidence, predating Sachs's initial conversation with Jackson, that corroborates that Rothwell interested Jackson

in the UPCM transaction. Jackson admits that he entered into the confidentiality agreement with UPCM and contacted Granite only after speaking with Sachs and that he knew, at some point, that Sachs expected a commission. Nevertheless, Jackson did nothing to inform Sachs that he was already working \*672 with Rothwell. According to Sachs, Jackson even made statements that he believed Sachs would receive a commission, and that he had no problem with that. While we recognize that these disputed facts do not directly contradict Rothwell's and Jackson's deposition testimonies, when viewed as a whole and in a light most favorable to Sachs, they are sufficient to place into dispute the question of whether Sachs or Rothwell was responsible for procuring Jackson as a buyer.<sup>FN11</sup>

FN11. By so holding, we merely conclude that summary judgment was inappropriate. "We do not necessarily say that [Sachs's] claims have merit. They may not. However, in 'reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.' " *Francisconi v. Union Pacific R.R.*, 2001 UT App 350, ¶ 17 n. 4, 36 P.3d 999 (quoting *Tretheway v. Miracle Mortgage Inc.*, 2000 UT 12, ¶ 2, 995 P.2d 599).

### III. Utah Real Estate Broker's Act

¶ 33 Defendants also argue that summary judgment on Sachs's express contract claims as well as his quantum meruit claims, for both contract implied in fact and contract implied in law, was proper for the independent reason that Utah's real estate broker's act (UREBA or the Act), *see* Utah Code Ann. §§ 61-2-1 to -27, bars Sachs from collecting a finder's fee as a matter of law. It is undisputed that Sachs was not licensed in Utah as a real estate broker at the time he claims to have solicited Jackson as a buyer for UPCM. Defendants contend that, because UPCM's only significant asset was its real property holdings and its primary activities were the development and marketing of

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that real property, the sale of 100% of UPCM's stock falls within UREBA's definition of real estate and bars Sachs from collecting a commission on the sale. This is an issue of first impression in Utah and has been treated variously by the courts that have considered it. Based on the language and history of the Utah statute, the long-held distinction between real and personal property, and the practical application of the Act, we hold that UREBA does not bar Sachs's claim.

¶ 34 UREBA includes both civil and criminal penalties for those acting as a principal real estate broker without a license. First, under the civil prong of UREBA,

[n]o person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under [UREBA] to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

Utah Code Ann. § 61-2-18 (2006) (emphasis added).

¶ 35 Second, the criminal prong of UREBA prohibits any person from “engag[ing] in the business, act[ing] in the capacity of, advertis[ing], or assum[ing] to act as a principal real estate broker ... within this state without a license.” Utah Code Ann. § 61-2-1 (2006). A “[p]rincipal real estate broker” or “principal broker” is defined to include any person “who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of,” Utah Code Ann. § 61-2-2(12)(d), certain transactions involving “real estate,” *id.* § 61-2-2(12)(a)(i).<sup>FN12</sup> When read together, these sections bar a person from maintaining a commission claim for procuring a buyer for real estate unless he was licensed at the time he engaged in the acts.<sup>FN13</sup> See Utah Code Ann. §§ 62-2-1(1), -2(12), -18(1); *Andalex Res., Inc. v. Myers*, 871 P.2d 1041, 1045 (Utah Ct.App.1994) (noting that UREBA provides that “(1) if a party brings an action in a Utah court, (2) for compensation, (3) for acts resulting in the sale or exchange of real estate, (4) he or she must have the \*673 requisite broker license in order to recover the commission”).

FN12. The transactions include, but are not limited to, those in which any person “sells or lists for sale, buys, exchanges, or auctions *real estate*, options on *real estate*, or improvements on *real estate* with the expectation of receiving valuable consideration.” Utah Code Ann. § 61-2-2(12)(a)(i) (emphasis added).

FN13. Although the language of UREBA speaks in terms of real estate brokers, the statute's prohibitions apply with equal force to the activities of real estate finders.

See *C.J. Realty, Inc. v. Willey*, 758 P.2d 923, 926 (Utah Ct.App.1988) (holding that Utah's real estate licensing statutes and statute of frauds apply equally to finders and brokers).

¶ 36 “Real estate” is defined by UREBA to “include[ ] leaseholds and *business opportunities involving real property*.” Utah Code Ann. § 61-2-2(14) (emphasis added). The phrase “business opportunities involving real property” is not, however, defined within the Act. Defendants argue that the sale of UPCM to Capital falls within this definition. In reaching this conclusion, Defendants assume that the proper inquiry is whether the ongoing business being conveyed engages in commercial activities involving real property. In contrast, Sachs argues that the sale of UPCM fell outside UREBA's definition of real estate because only stock was sold.

¶ 37 “When we interpret a statute, our ‘primary goal ... is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.’ ” *Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶ 32, 150 P.3d 521 (alteration in original) (quoting *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d 726). We reach this goal by first looking “to the plain language of a statute to determine its meaning, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” *Id.* (citation and quotations omitted). Only upon finding that the plain language is ambiguous do we proceed to “look to other interpretive tools.” *Id.* (quotations omitted).

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¶ 38 The plain language of section 61-2-2 of the Utah Code defines “ ‘Real Estate’ [to] include[ ] leaseholds and business opportunities involving real property.” Utah Code Ann. § 61-2-2(14). Neither the term “business opportunity” nor “business opportunity involving real property” is further defined in the chapter. Nevertheless, it is our task to give each word meaning, if possible. *See State v. Barrett*, 2005 UT 88, ¶ 29, 127 P.3d 682 (“We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.”(quotations omitted)). Defendants contend that the proper inquiry is whether the ongoing *business* engages in commercial activities involving real property. Had the legislature defined real estate to include businesses involving real property, we would agree that UREBA is applicable. The plain language of the statute, however, includes only business opportunities. *See* Utah Code Ann. § 61-2-2(14). And Defendants’ interpretation would render the word “opportunities” meaningless, something we must avoid when possible.<sup>FN14</sup> When we consider the plain language of the Act in its entirety, however, it is unclear from that language alone whether Sachs was required to comply with UREBA when finding a buyer for all of UPCM’s stock.

FN14. “Determining the legislature’s intent requires that ‘we seek to render all parts [of the statute] relevant and meaningful, and we accordingly avoid interpretations that will render portions of a statute superfluous or inoperative.’ ” *Carter v. University of Utah Med. Ctr.*, 2006 UT 78, ¶ 9, 150 P.3d 467 (alteration in original) (quoting *Hall v. Department of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958).

¶ 39 Although the plain language of the Act is ambiguous, we nevertheless find Defendants’ interpretation conflicts with the legislature’s intent as evidenced by the history of section 61-2-2.<sup>FN15</sup> *See* Utah Code Ann. § 61-2-2. Prior to 1985, the term “business opportunity” was defined in UREBA to “mean[ ] an existing business, a business and its good will, a business franchise, or any combination

of them.” Utah Code Ann. § 61-2-2(5) (Supp.1983) (amended 1985). However, in 1985, the Utah Legislature deleted this definition from the chapter. *See* Real Estate Amendments, ch. 162, § 2, 1985 Utah Laws 308, 309. We assume, therefore, that the legislature intended to redefine the phrase “business opportunities” to no longer mean existing businesses, businesses and their good will, or business franchises. *See Sindt v. Retirement Bd.*, 2007 UT 16, ¶ 13, 570 Utah Adv. Rep. 71 (“We may not ignore the legislature’s decision to remove the term.”). Indeed, the omission of this language “logically can mean nothing but that \*674 the legislature’s purpose deliberately was to remove” those terms from the definition. *Id.* Thus, prior to 1985 it may have been proper, as Defendants urge, to substitute the terms “existing business” for the phrase “business opportunities” in the definition of real estate and then to inquire whether the existing business’s activities involved real property. However, since the 1985 amendments, this inquiry is no longer appropriate. Instead, the proper inquiry is to examine the specific character of the business opportunity and to determine whether that opportunity involved real property.

FN15. Upon finding that the plain language of a statute is ambiguous, we are free to “look to other interpretive tools.” *Utah State Tax Comm’n v. Stevenson*, 2006 UT 84, ¶ 32, 150 P.3d 521 (quotations omitted).

¶ 40 Here, the business opportunity at issue is the purchase of all of UPCM’s capital stock. UPCM, as the surviving entity in the merger between UPCM and CGP Acquisitions, Inc., retained its corporate structure and all of its assets and liabilities, including its real property. Thus, no real estate changed hands as a result of the transaction. Stock or shares in a corporation are generally considered personal property <sup>FN16</sup> and represent only “[t]he shareholders’ essential right to share in the profits and in the distribution of assets on liquidation in proportion to their interest in the enterprise.” James D. Cox, Thomas Lee Hazen, & F. Hodge O’Neal, 1 Corporations § 7.2 (2002). This interest “is in no sense an individual right in

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specific property” of the corporation; instead, “[s]hareholders are in the position of claimants against the corporation with an expectation of sharing in the profits and a right to distribution of residual assets upon winding up.” *Id.*; cf. *MacKay v. Hardy*, 896 P.2d 626, 629 n. 4 (Utah 1995) (describing shareholder's interest in corporate assets as only an equitable interest).

FN16. An exception to the general rule arises with respect to stock in a mutual irrigation corporation, which has been held to represent an interest in real property. See *Salt Lake City Corp. v. Cahoon*, 879 P.2d 248, 252 (Utah 1994).

[18][19][20][21] ¶ 41 Because a corporation exists as a distinct legal entity, when the corporation acquires property, the title vests in it as a separate entity distinct from its shareholders. Utah has long recognized that “[a] corporate entity [is] separate and apart from its stockholders” even where a single or small group of stockholders own a controlling interest in the corporation.<sup>FN17</sup> *National Am. Life Ins. Co. v. Bainum*, 28 Utah 2d 45, 497 P.2d 854, 855-56 (1972); see also *Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 26 (Utah 1990) (discussing legal separation of shareholder and corporation); 12B Fletcher Cyclopedia of the Law of Private Corporations § 5771 (perm. ed. 2000) (“The owner of a majority, or all or nearly all of the stock of a corporation, whether an individual, a collection of individuals, or another corporation, does not own the property of the corporation.”). Likewise, “[w]hen a stockholder sells his stock, he is selling his proprietary interest in a going concern and not an interest in the corporate assets.”<sup>FN18</sup> *Owens v. Commissioner*, 568 F.2d 1233, 1239 (6th Cir.1977); cf. Utah Code Ann. § 16-10a-102(33) (2005) (defining “shares” in a corporation to “mean[ ] the units into which the proprietary interests in a corporation are divided”).

FN17. UPCM was a public corporation and its shares were traded on the New York Stock Exchange.

FN18. The distinctions between corporate stock and asset purchases are well recognized. Generally speaking, when all the assets of an ongoing business are purchased, “the purchaser does not acquire the liabilities of the corporation as a stock purchaser would.” *Bertha v. Remy Int'l, Inc.*, 414 F.Supp.2d 869, 877 (E.D.Wis.2006); see also *Decius v. Action Collection Serv., Inc.*, 2004 UT App 484, ¶ 8, 105 P.3d 956. Additionally, the purchaser in an asset transaction takes legal title to the property, i.e., “title to property transfers from one party to another [Conversely,] in a stock purchase transaction the corporation's assets remain titled in the corporation's name.” *Bertha*, 414 F.Supp.2d at 877. Because the sale of UPCM to Capital was accomplished exclusively through the sale of stock and involved no corporate assets, we do not address the applicability of Utah's real estate licensing provisions to a business opportunity accomplished through an asset transfer.

[22] ¶ 42 Applying the foregoing principles, we hold that Capital gained only a “proprietary interest in a going concern and not an interest in [UPCM's real property] assets.” *Owens*, 568 F.2d at 1239. UPCM continued to own, possess, and control the real property throughout and following the merger transaction. See, e.g., \*675 Utah Code Ann. § 16-10A-1106(b) (2005) (“The title to all real estate and other property owned by each corporation party to the merger is transferred to and vested in the surviving corporation without reversion or impairment.”). Thus, even though UPCM, as an ongoing business, exists for the sole purpose of owning and dealing in real estate, Sachs did not find a participant in a business opportunity involving real property because [s]hares of stock, which represent the holder's partial but undivided ownership of the corporation, constitute a property interest quite distinct from the capital or tangible assets of the corporation.... The fact that the entire capital may be invested in real estate does not change the character of the shares of the corporation as personal property.



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Richard A. Lord, 17 Williston on Contracts § 51:2 (4th ed.2006) (footnotes omitted); see, e.g., *Evans v. Prufrock Rests., Inc.*, 757 S.W.2d 804, 805-06 (Tex.Ct.App.1988) (noting that when there is “no assignment of [corporate] assets, but instead ... a sale of capital stock” that the transaction is for a sale of personality, not realty).

¶ 43 In reaching this result, we join those jurisdictions that recognize a distinction between the sale of assets and the sale of stock for purposes of applying statutes regulating the activities of real estate brokers. See *Gruber v. Owens-Illinois, Inc.*, 899 F.2d 1366, 1368-75 (3d Cir.1990) (interpreting Pennsylvania law and finding that sale of stock would be exempted from real estate licensing requirements), cited with approval by *Winthrop & Co. v. Milgrom*, 447 Pa.Super. 140, 668 A.2d 557, 560-61 (1995).<sup>FN19</sup> In *Gruber*, the Third Circuit reasoned that “commercial transactions” characterized by the purchase of shares in an existing corporation through stock acquisitions “would be distorted if the corporate form of sale were ignored, particularly when it is recognized that the title and ownership of whatever real estate may be involved in the sale remains within the corporate body, under the corporate name, and never changes hands.” <sup>FN20</sup> *Id.* at 1374. We agree that this long recognized principle should not be ignored lightly, nor without clear direction from the Utah Legislature.

FN19. See also, e.g., *Abramson v. Gulf Coast Jewelry & Specialty Co.*, 445 F.2d 802, 803 (5th Cir.1971) (per curiam) (finding that sale of stock fell outside Alabama's real estate licensing requirements); *Bertha*, 414 F.Supp.2d at 877-81 (finding Wisconsin's real estate licensing provisions inapplicable to sale of corporate stock); *Cambridge Co. v. Arizona Lawn Sprinklers, Inc.*, 166 Ariz. 269, 801 P.2d 504, 506 (Ct.App.1990) (noting that “if a purchaser had acquired [the business's] corporate stock or if the transaction had involved a merger or consolidation, [the broker] could have legally participated in the transaction

without holding a real estate license”); *Frier v. Terry*, 230 Ark. 302, 323 S.W.2d 415, 419 (1959) (“[T]he mere fact the corporation or corporations own buildings situated on realty did not necessitate the holding by [the broker] of a real estate license in order to claim a commission on the sale of corporate stock.”); *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 403 Mass. 291, 528 N.E.2d 1176, 1177 (1988) (“We accept that the sellers would have owed the full commission ... if corporate stock (and not assets) had been sold.”); *Moody v. Hurricane Creek Lumber Co.*, 290 Or. 729, 625 P.2d 1306, 1310-11 (1981) (holding that sale of stock of ongoing corporation was not calculated to result in the sale of real estate, and therefore fell outside real estate licensing requirements); *Evans v. Prufrock Rests., Inc.*, 757 S.W.2d 804, 805-06 (Tex.Ct.App.1988) (same).

FN20. Defendants argue that *Gruber v. Owens-Illinois, Inc.*, 899 F.2d 1366 (3d Cir.1990), represents a distinct minority position. However, careful reading of the cases that have expressly considered the distinction between stock and asset purchases suggests that the courts are more evenly divided. Regardless of which position boasts the higher number of decisions, for the reasons stated in this opinion, we conclude that the Utah Legislature did not intend UREBA to apply to the sale of corporate stock.

¶ 44 We acknowledge that some jurisdictions have interpreted similar acts of their legislatures as including the sale of a business through a stock transfer. See, e.g., *Cooney v. Ritter Trans., Inc.*, 939 F.2d 81, 84-88 (3d Cir.1991) (finding New Jersey licensing act applicable to sale of stock); *Shochet Secur., Inc. v. First Union Corp.*, 663 F.Supp. 1035, 1037 (S.D.Fla.1987) (finding sale of stock within Florida's licensing provisions); *All Points Traders, Inc. v. Barrington Assoc.*, 211 Cal.App.3d 723, 259 Cal.Rptr. 780, 786 (1989) (holding that real estate broker's license is required

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when negotiating the sale of 100% of corporate stock); \*676 *Lieff v. Medco Prof. Servs. Corp.*, 973 P.2d 1276, 1278 (Colo.Ct.App.1998) (same); *Everett v. Goodloe*, 268 Ga.App. 536, 602 S.E.2d 284, 289 (2004) (same); *Shortt v. Knob City Inv. Co.*, 58 N.C.App. 123, 292 S.E.2d 737, 740 (1982) (same); *Schmitt v. Coad*, 24 Wash.App. 661, 604 P.2d 507, 510 (1979) (same). In some instances, there are statutory differences that support a contrary approach.<sup>FN21</sup>

FN21. The Colorado definition of real estate broker extends to transactions involving a business, a business opportunity, or any interest therein. *See* Colo.Rev.Stat. Ann. § 12-61-101(2)(i) (West 2006) (emphasis added). In contrast, the Utah Legislature deleted the reference to an interest in an “existing business” from the definition of business opportunity in UREBA in 1985. *See* Real Estate Amendments, ch. 162, § 2, 1985 Utah Laws 308, 309.

¶ 45 For example, California has held that a stock transfer is subject to its real estate broker licensing requirements. *See All Points Traders*, 259 Cal.Rptr. at 786 (holding that real estate broker's license is required when negotiating the sale of 100% of a corporation's stock). Historically, California had separate licensing requirements for business opportunity transactions and real estate transactions. *See id.* at 782. However, due to confusion “as to whether a business opportunity broker's license, a real estate license, or both were required, when a business opportunity transaction involved real estate,” in 1965, the California Legislature “merged the real estate and business opportunity licenses under the supervision of [California's] Department of Real Estate.” *Id.* From its inception the business opportunities licensing requirements did not exempt incorporated businesses.<sup>FN22</sup> *See id.* Therefore, after the merger of the licensing requirements, California courts continued to apply the real estate licensing requirements to the sale of businesses involving the transfer of stock whether or not those opportunities involved real property. *See id.* The legislative

trends noted in California, however, are inapposite to those experienced in Utah.

FN22. California's real estate licensing statute is also broader than UREBA because it applies to all business opportunities, while Utah's applies only to business opportunities involving real property. *Compare* Cal. Bus. & Prof.Code. § 10131(a) (Deering 2007), *with* Utah Code Ann. § 61-2-2(14).

¶ 46 In 1921, Utah enacted its first statute regulating real estate brokers and real estate salespeople. *See* An Act to Define Real Estate Brokers and Real Estate Salesmen, ch. 110, §§ 1-16, 1921 Utah Laws 304, 304-09. At that time, the enforcement of the act was entrusted to the state securities commission. *See id.* § 4. The legislature amended the Act in 1939 to incorporate a definition for “real estate” that included “leaseholds and other interests not less than leaseholds” within the reach of the Act. Act of March 7, 1939, ch. 106, § 1, 1939 Utah Laws 140, 140. In 1963, the legislature again expanded the scope of the Act by amending the definition of real estate to include “leaseholds and business opportunities.” An Act Relating to Real Estate Brokers, ch. 146, § 1, 1963 Utah Laws 521, 522. Simultaneously, “business opportunities” was defined to “include an existing business, business and the good will attached thereto or any one or a combination thereof.” *Id.* At this point, Utah, like California, merged the licensing requirements for both business opportunity brokers and real estate brokers under the supervision of the securities commission.

¶ 47 The legislature enacted the Utah Uniform Securities Act (UUSA) in 1963, which provided for the registration of broker-dealers, agents, investment advisors, and securities. *See* Uniform Securities Act, ch. 145, § 1, 1963 Utah Laws 494, 494-521. Initially, enforcement of both the real estate broker's licensing act and the UUSA was the responsibility of the state securities commission. In 1983, the scope of the real estate licensing provisions was extended, by amending the definition of real estate to “include [ ] leaseholds,

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business opportunities, and all timeshare interests (including but not limited to fee simple, club membership, limited partnership, and beneficiary interest in a time share trust).” Division of Real Estate Amendments-Sunset Review, ch. 257, § 1, 1983 Utah Laws 1020, 1021. But, at that same time the Utah Legislature formed the Division of Real Estate within the Department of Business Regulation, effectively removing \*677 real estate broker licensing and enforcement from the securities commission. *See id.* § 5.

¶ 48 This reorganization split real estate licensing and enforcement from securities enforcement. Shortly thereafter, the legislature began collapsing the definition of real estate within the real estate licensing statute. In 1985, the Utah Legislature contracted the scope of the real estate broker's act in two ways. First, it narrowed the definition of real estate by including the limiting phrase “involving real property.” *See* Real Estate Amendments, ch. 162, § 2, 1985 Utah Laws 308, 309 (amending definition of real estate to include “leaseholds, business opportunities, and all timeshare interests ... involving real property ” (emphasis added)). Second, it deleted “existing business, business and the good will attached thereto or any one of a combination thereof” from the expansive definition of “business opportunity.” *Id.* When taken together, these changes signal the Utah Legislature's intent, unlike California, to narrow the scope of the real estate licensing statute and to recognize securities transactions as a distinct regulatory subject.<sup>FN23</sup>

FN23. The intent to distinguish securities transactions from real estate transactions is also apparent in the legislature's creation of exemptions that effectively abolish the need for dual licensing in transactions in which real estate is a necessary element of a security. *See* Utah Code Ann. § 61-2-3(3) (2006) (exempting licensed securities brokers from the real estate licensing requirements where the real estate in the transaction “is a necessary element of a ‘security’ ”); *cf. id.* § 61-1-13(1)(c)(ii)(G) (2006) (exempting

licensed real estate brokers from the licensing requirements of the Utah Uniform Securities Act when the transaction is for a “bond or other evidence of indebtedness secured by a ... mortgage or deed of trust, or by an agreement for the sale of real estate”).

Although it is unclear whether Sachs is a licensed securities broker, Defendants did not seek summary judgment on that ground. Thus, resolution of whether Sachs's claims are impacted by the application of federal or state securities laws is beyond the scope of this decision. *See Payable Accounting Corp. v. McKinley*, 667 P.2d 15, 18 (Utah 1983) (discussing securities transactions falling within scope of Federal and Utah securities laws); *cf. Bertha*, 414 F.Supp.2d at 877 (noting that legislative history suggests that stock sales are not covered by Wisconsin's real estate licensing statutes because they are “specifically governed by securities laws”); *Sergeant v. Leonard*, 312 N.W.2d 541, 547-48 (Iowa 1981) (recognizing applicability of Iowa's blue sky laws to transfer of business through sale of its common stock).

¶ 49 Furthermore, the purposes of UREBA are not advanced by requiring a Utah real estate broker's license for finding a buyer for 100% of the common stock of a publicly traded company. UREBA was adopted “for the protection of members of the public who rely on licensed real estate brokers and salespeople to perform tasks that require a high degree of honesty and integrity.” *Global Recreation, Inc. v. Cedar Hills Dev. Co.*, 614 P.2d 155, 158 (Utah 1980) (finding that the purpose of UREBA is “not to protect real estate developers who seek relief from their own contractual obligations”). Further, this is not a case like *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041 (Utah Ct.App.1994), where we held that the purpose of the Act cannot override its express statutory terms to exempt from regulation a transaction unambiguously covered by the Act. *See id.* at 1045 & n. 6. As discussed previously, the language of UREBA is ambiguous and we may,

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therefore, look to “the purpose the statute was meant to achieve” in interpreting its language. *See Utah State Tax Comm’n v Stevenson*, 2006 UT 84, ¶ 32, 150 P.3d 521. Thus, interpreting UREBA to have limited application is consistent with the purpose of the Act because it is highly unlikely that unsophisticated members of the public will be party to a merger which results in one corporation purchasing 100% of the common stock of another.

¶ 50 We also reject Defendants’ argument that our decision today elevates form over substance. Essentially, Defendants contend that the sale of all the stock of [a] corporation [is] in legal effect a sale of all of its assets, and the mere fact that the parties found it more convenient to transfer all of the stock rather than to make a conveyance of its assets does not change the substance of the transaction.

*Everett v Goodloe*, 268 Ga.App. 536, 602 S.E.2d 284, 289 (2004) (quoting *Kingston Dev Co v Kenerly*, 132 Ga.App. 346, 208 S.E.2d 118 (1974)). We cannot agree that \*678 the sale of the stock of a corporation is legally equivalent to a sale of its assets. Nor do we believe that the distinction between the two types of transactions elevates form over substance.

¶ 51 Utah has long recognized the importance of the separate legal identity of corporations and has been unwilling to permit parties to ignore those distinctions. *See Utah State Rd Comm’n v Steele Ranch*, 533 P.2d 888, 891 (Utah 1975) (“[W]here persons organize[ ] a corporation to acquire the advantages flowing from its existence as a separate entity, they should not be able to disregard the corporate entity to gain an advantage for another purpose.”). Here, Capital chose to structure its acquisition of UPCM as a stock rather than an asset purchase. “ ‘[T]he difference in a buyer’s assumption of liabilities when entering into a stock purchase agreement versus an asset purchase agreement is well-known in the business community. ’ ” *Bertha v Remy Int’l, Inc*, 414 F.Supp.2d 869, 881 (E.D.Wis.2006) (quoting *Columbia Propane*, 2003 WI 38, ¶ 29, 261 Wis.2d 70, 661 N.W.2d 776). Defendants should not be permitted to enjoy the benefits of UPCM’s separate corporate structure

for some purposes while also claiming it elevates form over substance in an attempt to defeat Sachs’s claim for a finder’s fee. *See Steele Ranch*, 533 P.2d at 891.<sup>FN24</sup>

FN24. Defendants’ position also raises additional questions, including the amount of real property that must be owned by the subject corporation and the number of shares that must be transferred before the licensing requirements of UREBA would be triggered. For example, would the sale of a single share of UPCM stock over the New York Stock Exchange require a Utah real estate license? *See, e.g., Cooney v Ritter Transp, Inc*, 939 F.2d 81, 88 (3d Cir.1991) (allowing an unlicensed finder of a buyer for corporate stock to recover a commission “on so much of the purchase price as is attributable to the personality” of the target corporation); *Thomas v Daubs*, 291 Ill.App.3d 682, 226 Ill.Dec. 15, 684 N.E.2d 1011, 1015 (1997) (allowing an unlicensed finder of a buyer for corporate stock to recover a commission “when real estate is only incidental to the entire transaction”); *March Group, Inc v Bellar*, 908 S.W.2d 956, 958-60 (Tenn.Ct.App.1995) (addressing whether stock transaction conveying a “controlling interest” in a corporation with 43% of its assets in real property triggered real estate licensing requirements and recognizing a presumption that a stock purchase is incidental unless real estate is the principal corporate asset).

#### IV. Statute of Frauds

[23][24] ¶ 52 As a separate ground for summary judgment, Defendants argue that Sachs’s claim to a finder’s fee is unenforceable under the Utah Statute of Frauds because there is no written memorandum of the alleged agreement. Defendants rely on Utah Code section 25-5-4, which provides that “every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation,” is “void unless the agreement, or

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some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement[.]” Utah Code Ann. § 25-5-4(1)(e). Defendants argue that the definition of “real estate” in UREBA, which includes business opportunities involving real property, *see* Utah Code Ann. § 61-2-2(14), is equally applicable to Utah's statute of frauds. Assuming, without deciding, that the statute of frauds utilizes the same definition of “real estate” as UREBA, Sachs's alleged finder's fee agreement falls outside the reach of that statute for the same reasons that UREBA is inapplicable. Specifically, section 25-5-4 of Utah's statute of frauds does not apply to brokerage agreements for the sale of exclusively personal property. And, as discussed in more detail above, the stock in a corporation is personalty, not realty. *See Evans v. Prufrock Rests, Inc.*, 757 S.W.2d 804, 805-06 (Tex.Ct.App.1988). This is true even where, as here, the corporation's only significant asset is its real property because ownership of stock is not the equivalent of an ownership interest in the corporation's assets. *See Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24, 51 S.Ct. 15, 75 L.Ed. 140 (1930). Therefore, agreements to broker corporate stock for compensation do not fall within the scope of section 25-5-4(1)(e).<sup>FN25</sup>

FN25. Indeed, Utah Code section 70A-8-112 specifically bars the application of Utah's statute of frauds to contracts for the sale or purchase of securities. *See* Utah Code Ann. § 70A-8-112 (2002).

\*679 ¶ 53 This interpretation is consistent with this court's decision in *Mackintosh v. Hampshire*, 832 P.2d 1298 (Utah Ct.App.1992). In that case, the plaintiff sued to enforce an oral contract for services in exchange for a 10% interest in the profits of a partnership's real estate developments. *See id.* at 1299. The partnership argued that the agreement was barred by the statute of frauds. We disagreed, reasoning that the plaintiff was claiming an interest only in the profits of the real estate project. *See id.* at 1301. Thus, the claim was not for an interest in the real property itself and therefore did not fall within the statute of frauds. *See id.* at 1302. Similarly, the purchase of the

shares of UPCM gave Capital an interest in only the profits and losses of the corporation and did not represent any legal interest in its real property assets. Thus, the statute of frauds does not bar Sachs's claim to a finder's fee.

## CONCLUSION

¶ 54 Under Utah law, an express contract for a finder's fee is not enforceable where the parties have not had a meeting of the minds on the essential term of the commission or fee to be paid, and summary judgment was properly granted on Sachs's claim for an express finder's fee agreement. However, summary judgment was improperly granted with respect to Sachs's claim for contract implied in fact because the disputed facts could support the conclusion that Defendants requested performance, Sachs expected to be compensated, and Defendants knew or should have known that Sachs expected to be paid. Additionally, Sachs's claims for contract implied in fact and contract implied in law are not barred by UREBA because the Act does not require a real estate license to engage in transactions dealing exclusively in corporate stock. Likewise, section 25-5-4(1)(e) of Utah's statute of frauds does not apply to transactions dealing with personal, as opposed to real property.

¶ 55 Accordingly, we affirm in part and reverse and remand in part.

¶ 56 I CONCUR: WILLIAM A. THORNE JR., Judge.

¶ 57 I CONCUR IN THE RESULT: RUSSELL W. BENCH, Presiding Judge.

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END OF DOCUMENT

Tab 2

(a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than  $\frac{1}{4}$  of its circulation outside this state during the past 12 months; or

(b) a radio or television program originating outside this state is received in this state.

(6) Section 61-1-2 and Subsection 61-1-3(3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

(7) (a) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it prescribes by rule, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent.

(b) A person who has filed such a consent in connection with a previous registration or notice filing need not file another.

(c) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(8) (a) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

(b) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last-known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

1997

#### 61-1-27. Construction of chapter.

This chapter may be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

1983

#### 61-1-28. Citation of chapter.

This chapter may be cited as the Utah Uniform Securities Act.

1983

#### 61-1-29. Savings clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application.

1983

#### 61-1-30. Prior law repealed — Savings clause.

(1) The Securities Act, Title 61, Chapter 1, Utah Code Annotated 1953, as amended by Chapter 129, Laws of Utah 1957, is hereby repealed except as saved in this section.

(2) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this chapter, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after the effective date of this chapter.

(3) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this chapter had not been passed. They are considered to have been filed, entered, or imposed under this chapter, but are governed by prior law.

(4) Prior law applies in respect of any offer or sale made within one year after the effective date of this chapter pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law.

(5) Judicial review of all administrative orders as to which review proceedings have not been instituted by the effective date of this chapter are governed by Section 61-1-23, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within 60 days after the effective date of this chapter.

1983

## CHAPTER 2

### DIVISION OF REAL ESTATE

#### Section

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**61-2-1. License required.**

(1) It is unlawful for any person to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent within this state without a license obtained under this chapter.

(2) It is unlawful for any person outside the state to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent with respect to real estate located within the state without a license obtained under this chapter.

1996

**61-2-2. Definitions.**

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

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(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

1997

#### 61-2-3. Exempt persons and transactions.

(1) (a) Except as provided in Subsection (1)(b), a license under this chapter is not required for:

(i) any person who as owner or lessor performs the acts described in Subsection 61-2-2(12) with reference to property owned or leased by that person;

(ii) a regular salaried employee of the owner or lessor of real estate who, with reference to nonresidential real estate owned or leased by the employer, performs the acts enumerated in Subsections 61-2-2(12)(a) and (b);

(iii) a regular salaried employee of the owner of real estate who performs property management services with reference to real estate owned by the employer, except that the employee may only manage property for one employer;

(iv) a person who performs property management services for the apartments at which that person resides in exchange for free or reduced rent on that person's apartment;

(v) a regular salaried employee of a condominium homeowners' association who manages real property subject to the declaration of condominium that established the homeowners' association, except that the employee may only manage property for one condominium homeowners' association; and

(vi) a regular salaried employee of a licensed property management company who performs support services, as prescribed by rule, for the property management company.

(b) Subsection (1)(a) does not exempt from licensing:

(i) employees engaged in the sale of properties regulated under Title 57, Chapter 11, Utah Uniform Land Sales Practices Act and Title 57, Chapter 19, Timeshare and Camp Resort Act;

(ii) employees engaged in the sale of cooperative interests regulated under Title 57, Chapter 23, Real Estate Cooperative Marketing Act; or

(iii) any person whose interest as an owner or lessor was obtained by him or transferred to him for the purpose of evading the application of this chapter, and not for any other legitimate business reason.

(2) A license under this chapter is not required for:

(a) isolated transactions by persons holding a duly executed power of attorney from the owner;

(b) services rendered by an attorney at law in performing his duties as an attorney at law;

(c) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(d) a trustee or its employees under a deed of trust or a will; or

(e) any public utility, its officers, or regular salaried employees, unless performance of any of the acts set out in Subsection 61-2-2(12) is in connection with the sale, purchase, lease, or other disposition of real estate or investment in real estate unrelated to the principal business activity of that public utility.

(3) (a) Except as provided in Subsection (3)(b), a license under this chapter is not required for any person registered to act as a broker-dealer, agent, or investment

advisor under the Utah and federal securities laws in the sale or the offer for sale of real estate if:

(i) the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934; and

(ii) the security is registered for sale pursuant to the Securities Act of 1933 or by Title 61, Chapter 1, Utah Uniform Securities Act.

(b) The exemption in Subsection (3)(a) does not apply to exempt or resale transactions.

1996

#### 61-2-4. One act for compensation qualifies person as broker or sales agent.

Except as provided in Section 61-2-3, one act, for valuable consideration, of buying, selling, leasing, managing, or exchanging real estate for another, or of offering for another to buy, sell, lease, manage, or exchange real estate, requires the person performing, offering, or attempting to perform the act to be licensed as a principal real estate broker, an associate real estate broker, or a real estate sales agent as set forth in this chapter.

1996

#### 61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of Commerce a Division of Real Estate. It is responsible for the administration and enforcement of:

(a) this chapter;

(b) the Real Estate Education, Research, and Recovery Fund under Title 61, Chapter 2a;

(c) Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;

(d) Title 57, Chapter 19, Timeshare and Camp Resort Act;

(e) Title 57, Chapter 23, Real Estate Cooperative Marketing Act; and

(f) Title 61, Chapter 2b, Real Estate Appraiser Registration and Certification Act.

(2) The division is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director holds his office at the pleasure of the governor.

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Administrative Services.

(4) On or before October 1 of each year, the director shall, in conjunction with the department, report to the governor and the Legislature concerning the division's work for the preceding fiscal year ending June 30.

(5) The director, in conjunction with the executive director, shall prepare and submit to the governor and the Legislature a budget for the fiscal year next following the convening of the Legislature.

1993

#### 61-2-5.1. Procedures — Adjudicative proceedings.

The Division of Real Estate shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its adjudicative proceedings.

1997

#### 61-2-5.5. Real Estate Commission created — Functions — Appointment, qualifications, and terms of members — Expenses.

(1) There is created within the division a Real Estate Commission. The commission shall:

(a) make rules for the administration of this chapter which are not inconsistent with this chapter, including:

(i) licensing of principal brokers, associate brokers, sales agents, real estate companies, and branch offices;

(ii) prelicensing and postlicensing education curricula, examination procedures, and the certification and conduct of real estate schools, course providers, and instructors;

(iii) proper handling of funds received by real estate licensees, and brokerage office procedures and recordkeeping requirements;

(iv) property management; and

(v) standards of conduct for real estate licensees;

(b) establish, with the concurrence of the division, all fees as provided in this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act;

(c) conduct all administrative hearings not delegated by it to an administrative law judge relating to the licensing of any applicant, conduct of any licensee, or the certification or conduct of any real estate school, course provider, or instructor regulated under this chapter;

(d) with the concurrence of the director, impose sanctions against licensees and certificate holders as provided in Section 61-2-11;

(e) advise the director on the administration and enforcement of any matters affecting the division and the real estate sales and property management industries;

(f) advise the director on matters affecting the division budget;

(g) advise and assist the director in conducting real estate seminars; and

(h) perform other duties as provided by this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act.

(2) (a) The commission shall be comprised of five members appointed by the governor and approved by the Senate.

(b) Four of the commission members shall have at least five years' experience in the real estate business and shall hold an active principal broker, associate broker, or sales agent license.

(c) One commission member shall be a member of the general public.

(d) No more than one commission member may be appointed from any given county in the state.

(3) (a) Except as required by Subsection (b), as terms of current commission members expire, the governor shall appoint each new member or reappointed member to a four-year term ending June 30.

(b) Notwithstanding the requirements of Subsection (a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of commission members are staggered so that approximately half of the commission is appointed every two years.

(c) A commission member may not serve more than one consecutive term.

(d) Members of the commission shall annually select one member to serve as chair.

(4) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.

(5) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(b) Members may decline to receive per diem and expenses for their service.

(6) The commission shall meet at least monthly. The director may call additional meetings at his discretion or upon the request of the chair or upon the written request of three or more commission members. Three members constitute a quorum for the transaction of business.

1996

#### 61-2-6. Licensing procedures and requirements.

(1) The Real Estate Commission shall determine the qualifications and requirements of applicants for a principal broker, associate broker, or sales agent license. The division, with the concurrence of the commission, shall require and pass upon proof necessary to determine the honesty, integrity, truthfulness, reputation, and competency of each applicant for an initial license or for renewal of an existing license. The division, with the concurrence of the commission, shall require an applicant for a sales agent license to complete an approved educational program not to exceed 90 hours, and an applicant for an associate broker or principal broker license to complete an approved educational program not to exceed 120 hours. The hours required by this section mean 50 minutes of instruction in each 60 minutes; and the maximum number of program hours available to an individual is ten hours per day. The division, with the concurrence of the commission, shall require the applicant to pass an examination approved by the commission covering the fundamentals of the English language, arithmetic, bookkeeping, real estate principles and practices, the provisions of this chapter, the rules established by the Real Estate Commission, and any other aspect of Utah real estate license law considered appropriate. Three years' full-time experience as a real estate sales agent or its equivalent is required before any applicant may apply for, and secure a principal broker or associate broker license in this state. The commission shall establish by rule the criteria by which it will accept experience or special education in similar fields of business in lieu of the three years' experience.

(2) (a) The division, with the concurrence of the commission, may require an applicant to furnish a sworn statement setting forth evidence satisfactory to the division of the applicant's reputation and competency as set forth by rule.

(b) The division shall require an applicant to provide his social security number, which is a private record under Subsection 63-2-302(1)(g).

(3) A nonresident principal broker may be licensed in this state by conforming to all the provisions of this chapter except that of residency. A nonresident associate broker or sales agent may become licensed in this state by conforming to all the provisions of this chapter except that of residency and by being employed or engaged as an independent contractor by or on behalf of a nonresident or resident principal broker who is licensed in this state.

(4) An applicant who has had a real estate license revoked shall be relicensed as prescribed for an original application, but may not apply for a new license until at least five years after the revocation. In the case of an applicant for a new license as a principal broker or associate broker, the applicant is not entitled to credit for experience gained prior to the revocation of license.

1997

#### 61-2-7. Form of license — Display of license.

The division shall issue to each licensee a wall license showing the name and address of the licensee. The seal of the state shall be affixed to each license. Each license shall contain any other matter prescribed by the division and shall be delivered or mailed to the address furnished by the licensee. The wall licenses of principal brokers, associate brokers, and sales agents who are affiliated with an office shall be kept in the office to be made available on request.

1991

#### 61-2-7.1. Change of address — Failure to notify.

Each licensee or certificate holder shall notify the division in writing of any change of principal business location or home street address within ten business days of the change. In providing an address to the division a physical location or street address must be provided. Failure to notify the division of a change of business location is separate grounds for

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disciplinary action against the licensee or certificate holder. A licensee or certificate holder will be considered to have received any notification which has been mailed to the last address furnished to the division by the licensee. 1991

#### 61-2-7.2. Reporting requirements.

The following must be reported in writing to the division within ten business days:

- (1) conviction of any criminal offense; or
- (2) filing a personal or brokerage bankruptcy. 1991

#### 61-2-8. Discharge of associate broker or sales agent by principal broker — Notice.

If an associate broker or sales agent is discharged by a principal broker, the principal broker shall, within three days, notify the division in writing. The principal broker shall address a communication to the last-known residence address of that associate broker or sales agent advising him that notice of his termination has been delivered or mailed to the division. It is unlawful for any associate broker or sales agent to perform any of the acts under this chapter, directly or indirectly, from and after the date of receipt of the termination notice until affiliation with a principal broker has been established. 1988

#### 61-2-9. Examination and license fees — Renewal of licenses — Education requirements — Activation of inactive licenses — Recertification — Licenses of firm, partnership, or association — Miscellaneous fees.

- (1) (a) Upon filing an application for a principal broker, associate broker, or sales agent license examination, the applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for admission to the examination.

(b) A principal broker, associate broker, or sales agent applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for issuance of an initial license or license renewal.

(c) Each license issued under this subsection shall be issued for a period of not less than two years as determined by the division with the concurrence of the commission.

- (d) (i) Any new sales agent applicant shall submit fingerprint cards in a form acceptable to the division at the time the license application is filed and shall consent to a fingerprint background check by the Utah Bureau of Criminal Identification and the Federal Bureau of Investigation regarding the application.

(ii) The division shall request the Department of Public Safety to complete a Federal Bureau of Investigation criminal background check for each new sales agent applicant through the national criminal history system (NCIC) or any successor system.

(iii) The cost of the background check and the fingerprinting shall be borne by the applicant.

- (e) (i) Any new sales agent license issued under this section shall be conditional, pending completion of the criminal background check. If the criminal background check discloses the applicant has failed to accurately disclose a criminal history, the license shall be immediately and automatically revoked.

(ii) Any person whose conditional license has been revoked under Subsection (e)(i) shall be entitled to a post-revocation hearing to challenge the revocation. The hearing shall be conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(2) (a) A license expires if it is not renewed on or before its expiration date. Effective January 1, 1992, as a condition of renewal, each active licensee shall demonstrate competence by viewing an approved real estate education video program and completing a supplementary workbook, or complete 12 hours of professional education approved by the division and commission within each two-year renewal period. The division with the concurrence of the commission shall certify education which may include, but shall not be limited to, state conventions, home study courses, video courses, and closed circuit television courses. The commission with concurrence of the division may exempt a licensee from this education requirement for a period not to exceed four years upon a finding of reasonable cause and under conditions established by rule.

(b) For a period of 30 days after the expiration date, a license may be reinstated upon payment of a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2 and upon providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

(c) After this 30-day period, and until six months after the expiration date, the license may be reinstated by:

(i) paying a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2;

(ii) providing to the division proof of satisfactory completion of the applicable hours of prelicensing education required under Section 61-2-6, which must be completed within six months prior to reinstatement, or providing to the division evidence of successful completion of the respective sales agent or broker licensing examination within six months prior to reinstatement; and

(iii) providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

(d) A person who does not renew his license within six months after the expiration date shall be relicensed as prescribed for an original application.

- (3) As a condition for the activation of an inactive license, a licensee shall supply the division with proof of:

(a) successful completion of the respective sales agent or broker licensing examination within six months prior to activation; or

(b) the successful completion of the number of hours of continuing education that the licensee would have been required to complete under Subsection (2)(a) if the licensee's license had been on active status, up to the number of hours required for original licensure. Credit shall be given only for education that has been taken within the five years preceding activation, except that at least 12 hours of the education must have been taken within 12 months preceding activation.

- (4) A principal broker license may be granted to a corporation, partnership, or association if the corporation, partnership, or association has affiliated with it an individual who has qualified as a principal broker under the terms of this chapter, and who serves in the capacity of a principal broker. Application for the license shall be made in accordance with the rules adopted by the division with the concurrence of the commission.

(5) The division may charge and collect reasonable fees determined by the commission with the concurrence of the division under Section 63-38-3.2 to cover the costs for:

- (a) issuance of a new or duplicate license;
- (b) license histories or certifications;
- (c) certified copies of official documents, orders, and other papers and transcripts;
- (d) certifying real estate schools, courses, and instructors, the fees for which shall, notwithstanding Section 13-1-2, be deposited in the Real Estate Education, Research, and Recovery Fund; and
- (e) other duties required by this chapter.

(6) If a licensee submits or causes to be submitted a check, draft, or other negotiable instrument to the division for payment of fees, and the check, draft, or other negotiable instrument is dishonored, the transaction for which the payment was submitted is void and will be reversed by the division if payment of the applicable fee is not received in full.

(7) The fees under this chapter and the additional license fee for the Real Estate Education, Research, and Recovery Fund under Section 61-2a-4 are in lieu of all other license fees or assessments that might otherwise be imposed or charged by the state or any of its political subdivisions, upon, or as a condition of, the privilege of conducting the business regulated by this chapter, except that a political subdivision within the state may charge a business license fee if the licensee maintains a place of business within the jurisdiction of the political subdivision. Unless otherwise exempt, each licensee under this chapter is subject to all taxes imposed under Title 59, Revenue and Taxation.

1997

#### 61-2-10. Restriction on commissions — Affiliation with more than one broker — Specialized licenses — Designation of agents or brokers.

(1) It is unlawful for any associate broker or sales agent to accept valuable consideration for the performance of any of the acts specified in this chapter from any person except the principal broker with whom he is affiliated and licensed.

(2) An inactive associate broker or sales agent is not authorized to conduct real estate transactions until the inactive associate broker or sales agent becomes affiliated with a licensed principal broker and submits the required documentation to the division. An inactive principal broker is not authorized to conduct real estate transactions until the principal broker's license is activated with the division.

(3) No sales agent or associate broker may affiliate with more than one principal broker at the same time.

(4) (a) Except as provided by rule, a principal broker may not be responsible for more than one real estate brokerage at the same time.

(b) In addition to issuing principal broker, associate broker, and sales agent licenses authorizing the performance of all of the acts set forth in Subsection 61-2-2(12), the division may issue specialized sales licenses and specialized property management licenses with the scope of practice limited to the specialty. An individual may hold a specialized license in addition to a license to act as a principal broker, an associate broker, or a sales agent. The commission may adopt rules pursuant to Title 63, Chapter 46a, Utah Administrative Procedures Act, for the administration of this provision, including prelicensing and postlicensing education requirements, examination requirements, affiliation with real estate brokerages or property management companies, and other licensing procedures.

(c) An individual may not be a principal broker of a brokerage and a sales agent or associate broker for a different brokerage at the same time.

(5) Any owner, purchaser, lessor, or lessee who engages the services of a principal broker may designate which sales agents or associate brokers affiliated with that principal broker will also represent that owner, purchaser, lessor, or lessee in the purchase, sale, lease, or exchange of real estate, or in exercising an option relating to real estate.

1996

#### 61-2-11. Investigations — Subpoena power of division — Grounds for disciplinary action.

The division may investigate or cause to be investigated the actions of any principal broker, associate broker, sales agent, real estate school, course provider, or school instructor licensed or certified by this state, or of any applicant for licensure or certification, or of any person who acts in any of those capacities within this state. The division is empowered to subpoena witnesses, take evidence, and require by subpoena duces tecum the production of books, papers, contracts, records, other documents, or information considered relevant to the investigation. The division may serve subpoenas by certified mail. Each failure to respond to a subpoena is considered as a separate violation of this chapter. The commission, with the concurrence of the director, may impose a civil penalty in an amount not to exceed \$500 per violation, impose educational requirements, and suspend, revoke, place on probation, or deny renewal, reinstatement, or reissuance of any license or any certification if at any time the licensee or certificate holder, whether acting as an agent or on his own account, is found guilty of:

- (1) making any substantial misrepresentation;
- (2) making any false promises of a character likely to influence, persuade, or induce;
- (3) pursuing a continued and flagrant course of misrepresentation, or of making false promises through agents, sales agents, advertising, or otherwise;
- (4) acting for more than one party in a transaction without the informed consent of all parties;
- (5) acting as an associate broker or sales agent while not licensed with a licensed principal broker, representing or attempting to represent a broker other than the principal broker with whom he is affiliated, or representing as sales agent or having a contractual relationship similar to that of sales agent with other than a licensed principal broker;
- (6) failing, within a reasonable time, to account for or to remit any monies coming into his possession that belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;
- (7) paying or offering to pay valuable consideration, as defined by the commission, to any person not licensed under this chapter, except that valuable consideration may be shared with a licensed principal broker of another jurisdiction or as provided under the Professional Corporation Act or the Limited Liability Company Act;
- (8) being unworthy or incompetent to act as a principal broker, associate broker, or sales agent in such manner as to safeguard the interests of the public;
- (9) failing to voluntarily furnish copies of all documents to all parties executing the documents;
- (10) failing to keep and make available for inspection by the division a record of each transaction, including the names of buyers and sellers or lessees and lessors, the identification of the property, the sale or rental price, any monies received in trust, any agreements or instructions from buyers and sellers or lessees and lessors, and any other information required by rule;
- (11) failing to disclose, in writing, in the purchase, sale, or rental of property, whether the purchase, sale, or rental is made for himself or for an undisclosed principal;
- (12) regardless of whether the crime was related to real estate, being convicted of a criminal offense involving moral turpitude within five years of the most recent application, including a conviction based upon a plea of nolo contendere, or a plea held in abeyance to a criminal offense involving moral turpitude;

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(13) advertising the availability of real estate or the services of a licensee in a false, misleading, or deceptive manner;

(14) in the case of a principal broker or a licensee who is a branch manager, failing to exercise reasonable supervision over the activities of his licensees and any unlicensed staff;

(15) violating or disregarding this chapter, an order of the commission, or the rules adopted by the commission and the division;

(16) breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction;

(17) any other conduct which constitutes dishonest dealing;

(18) unprofessional conduct as defined by statute or rule; or

(19) suspension, revocation, surrender, or cancellation of a real estate license issued by another jurisdiction, or of another professional license issued by this or another jurisdiction, based on misconduct in a professional capacity that relates to character, honesty, integrity, or truthfulness.

1997

#### 61-2-12. Disciplinary action — Judicial review.

(1) (a) Before imposing an educational requirement, a civil penalty, revoking, suspending, placing on probation, or denying the renewal, reinstatement, or reissuance of any license or certificate based on violation of Section 61-2-11, the division shall give notice to the licensee or certificate holder and schedule an adjudicative proceeding.

(b) If the licensee is an active sales agent or active associate broker, the division shall inform the principal broker with whom the licensee is affiliated of the charge and of the time and place of the hearing.

(c) If after the hearing the commission determines that any licensee or certificate holder is guilty of a violation of this chapter, the license or certificate may be suspended, revoked, denied reissuance, or a civil penalty may be imposed by written order of the commission in concurrence with the director.

(2) (a) Any applicant, certificate holder, licensee, or person aggrieved, including the complainant, may obtain judicial review or agency review by the executive director of any adverse ruling, order, or decision of the director and the commission.

(b) If the applicant, certificate holder, or licensee prevails in the appeal and the court finds that the state action was undertaken without substantial justification, the court may award reasonable litigation expenses to the applicant, certificate holder, or licensee as provided under Title 78, Chapter 27a, Small Business Equal Access to Justice Act.

(c) (i) No order, rule, or decision of the director and the commission may take effect until the time for appeal to the court has expired.

(ii) If an appeal is taken by a licensee, the division shall stay enforcement of the commission's action in accordance with the provisions of Section 63-46b-18.

(iii) The appeal shall be governed by the Utah Rules of Appellate Procedure.

(3) The commission and the director shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, in their adjudicative proceedings.

1993

#### 61-2-13. Grounds for revocation of principal broker's license — Automatic inactivation of affiliated associate brokers' and sales' agents' licenses.

(1) Any unlawful act or any violation of this chapter committed by any real estate sales agent or associate broker

employed or engaged as an independent contractor by or on behalf of a licensed principal broker or committed by any employee, officer, or member of a licensed principal broker is cause for the revocation, suspension, or probation of the principal broker's license, or for the imposition of a fine against the principal broker in an amount not to exceed \$500 per violation.

(2) The revocation or suspension of a principal broker license automatically inactivates every associate broker or sales agent license granted to those persons by reason of their affiliation with the principal broker whose license was revoked or suspended, pending a change of broker affiliation. A principal broker shall, prior to the effective date of the suspension or revocation of his license, notify in writing every licensee affiliated with him of the revocation or suspension of his license.

1991

#### 61-2-13.5. Court-ordered discipline.

The division shall promptly withhold, suspend, restrict, or reinstate the use of a license issued under this chapter if so ordered by a court.

1997

#### 61-2-14. List of licensees to be available.

The division shall make available at reasonable cost a list of the names and addresses of all persons licensed by it under this chapter.

1983

#### 61-2-15, 61-2-16. Repealed.

1973

#### 61-2-17. Penalty for violation of chapter.

(1) Any individual violating this chapter, in addition to being subject to a license sanction or a fine ordered by the commission, is, upon conviction of a first violation, guilty of a class A misdemeanor. Any imprisonment shall be for a term not to exceed six months. If the violator is a corporation, it is, upon conviction of a first violation, guilty of a class A misdemeanor.

(2) Upon conviction of a second or subsequent violation, an individual is guilty of a third degree felony. Imprisonment shall be for a term not to exceed two years. If a corporation is convicted of a second or subsequent violation, it is guilty of a third degree felony.

(3) Any officer or agent of a corporation, or any member or agent of a partnership or association, who personally participates in or is an accessory to any violation of this chapter by such corporation, partnership, or association, is subject to the penalties prescribed for individuals.

(4) If any person receives any money or its equivalent, as commission, compensation, or profit by or in consequence of a violation of this chapter, that person is liable for an additional penalty of not less than the amount of the money received and not more than three times the amount of money received, as may be determined by the court. This penalty may be sued for in any court of competent jurisdiction, and recovered by any person aggrieved for his own use and benefit.

(5) All fines imposed by the commission and the director under this chapter shall, notwithstanding Section 13-1-2, be deposited into the Real Estate Education, Research, and Recovery Fund to be used in a manner consistent with the requirements of the Real Estate Recovery Fund Act.

1993

#### 61-2-18. Actions for recovery of compensation restricted.

(1) No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

(2) No sales agent or associate broker may sue in his own name for the recovery of a fee, commission, or compensation

for services as a sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission, or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated. 1985

#### 61-2-19. Repealed. 1983

#### 61-2-20. Rights and privileges of real estate licensees.

Real estate licensees may fill out only those legal forms approved by the commission and the attorney general, and those forms provided by statute, with the following exceptions:

(1) Principal brokers and associate brokers may fill out any documents associated with the closing of a real estate transaction.

(2) Real estate licensees may fill out real estate forms prepared by legal counsel of the buyer, seller, lessor, or lessee.

(3) If the commission and the attorney general have not approved a specific form for the transaction, principal brokers, associate brokers, and sales agents may fill out real estate forms prepared by any legal counsel, including legal counsel retained by the brokerage to develop these forms. 1993

#### 61-2-21. Remedies and action for violations.

(1) (a) If the director has reason to believe that any person has been or is engaging in acts constituting violations of this chapter, and if it appears to the director that it would be in the public interest to stop such acts, he shall issue and serve upon the person an order directing that person to cease and desist from those acts.

(b) Within ten days after receiving the order, the person upon whom the order is served may request an adjudicative proceeding.

(c) Pending the hearing, the cease and desist order shall remain in effect.

(d) If a request for a hearing is made, the division shall follow the procedures and requirements of Title 63, Chapter 46b.

(2) (a) After the hearing, if the commission and the executive director agree that the acts of the person violate this chapter, the executive director shall issue an order making the cease and desist order permanent.

(b) If no hearing is requested and if the person fails to cease the acts, or after discontinuing the acts, again commences the acts, the executive director shall file suit in the name of the Department of Commerce and the Division of Real Estate, in the district court in the county in which the acts occurred or where the person resides or carries on business, to enjoin and restrain the person from violating this chapter.

(c) The district courts of this state shall have jurisdiction of these suits.

(3) The remedies and action provided in this section may not interfere with, or prevent the prosecution of, any other remedies or actions including criminal proceedings. 1989

#### 61-2-22. Separability.

If any provision of this chapter, or the application of any provision to any person or circumstance, is held invalid, the remainder of this chapter shall not be affected thereby. 1985

#### 61-2-23. Repealed. 1988

#### 61-2-24. Mishandling of trust funds.

(1) The division may audit principal brokers' trust accounts or other accounts in which a licensee maintains trust funds under this chapter. If the division's audit shows, in the opinion of the division, gross mismanagement, commingling, or mis-

use of funds, the division, with the concurrence of the commission, may order a complete audit of the account by a certified public accountant at the licensee's expense, or take other action in accordance with Section 61-2-12.

(2) The licensee may obtain agency review by the executive director or judicial review of any division order.

(3) If it appears that a person has grossly mismanaged, commingled, or otherwise misused trust funds, the division, with or without prior administrative proceedings, may bring an action in the district court of the district where the person resides or maintains a place of business, or where the act or practice occurred or is about to occur, to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter. Upon a proper showing, the court shall grant injunctive relief or a temporary restraining order, and may appoint a receiver or conservator. The division is not required to post a bond in any court proceeding. 1996

### CHAPTER 2a

#### REAL ESTATE RECOVERY FUND

Section	Citation.
61-2a-1.	Purpose.
61-2a-2.	Education, Research, and Recovery Fund.
61-2a-3.	Additional license fee — Purpose.
61-2a-4.	Notice to division — Judgment against real estate licensee — Fraud, misrepresentation, or deceit — Verified petition for order directing payment from fund — Limitations and procedures.
61-2a-5.	Real Estate Division — Authority to act upon receipt of petition.
61-2a-6.	Court determination and order.
61-2a-7.	Insufficient funds to satisfy judgments — Procedure and interest.
61-2a-8.	Division subrogated to judgment creditor — Authority to revoke license.
61-2a-9.	Failure to comply with all provisions constitutes a waiver.
61-2a-10.	Director of Department of Commerce — Authority to take disciplinary action not limited.
61-2a-11.	Moneys accumulated — Excess set aside — Purpose.
61-2a-12.	

#### 61-2a-1. Citation.

This act shall be known and may be cited as the "Real Estate Recovery Fund Act." 1976

#### 61-2a-2. Purpose.

The purposes of this chapter are as follows:

(1) To establish a Real Estate Education, Research, and Recovery Fund that shall reimburse the public out of the fund for damages up to \$10,000 caused by real estate licensees in a real estate transaction. This chapter applies to damages caused by individual licensees. Reimbursement may not be made for judgments against corporations, partnerships, associations, or other legal entities.

(2) To provide revenue for improving the real estate profession through education and research with the goal of making real estate salesmen more responsible to the public. 1989

#### 61-2a-3. Education, Research, and Recovery Fund.

There is created a segregated special trust fund to be known as the Real Estate Education, Research, and Recovery Fund. The actual interest earned on the Real Estate Education, Research, and Recovery Fund shall be deposited into the fund. At the commencement of each fiscal year, \$100,000 shall be

Tab 3

**UTAH CODE  
ANNOTATED**

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**2005 Supplement**

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**REPLACEMENT VOLUME 6C**

**2000 EDITION**

**Place with Corresponding Bound Volume.**

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Edited by  
the Publisher's Editorial Staff

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**LexisNexis®**



Grainger, 2004 UT 61, 504 Utah Adv. Rep. 7, 96 P.3d 927.

## 61-1-26. Scope of the act — Service of process.

### NOTES TO DECISIONS

#### **In personam jurisdiction.**

This section provides a substitute method for service of process, assuming that jurisdiction over the defendant is proper, it does not provide

for personal jurisdiction over a defendant absent minimum contacts MFS Series Trust III v Grainger, 2004 UT 61, 504 Utah Adv. Rep. 7, 96 P.3d 927.

## CHAPTER 2

### DIVISION OF REAL ESTATE

Section		Section	
61-2-2.	Definitions.	61-2-11.	Investigations — Subpoena power of division — Grounds for disciplinary action.
61-2-5.5.	Real Estate Commission created — Functions — Appointment — Qualification and terms of members — Expenses — Meetings.	61-2-11.5.	Investigations related to an undivided fractionalized long-term estate.
61-2-6.	Licensing procedures and requirements.	61-2-12.	Disciplinary action — Judicial review.
61-2-7.1.	Change of information — Failure to notify — Notification to an applicant, licensee, or certificate holder.	61-2-21.	Remedies and action for violations.
61-2-9.	Examination and license fees — Background check — Renewal of licenses — Education requirements — Activation of inactive licenses — Recertification — Licenses of firm, partnership, or association — Miscellaneous fees.	61-2-25.	Sales agents — Affiliated with broker as independent contractors or employees — Presumption.
		61-2-26.	Rulemaking required for offer or sale of an undivided fractionalized long-term estate — Disclosures — Management agreement.
		61-2-27.	Exclusive brokerage agreement

#### 1-2-2. Definitions.

As used in this chapter:

(1) “Associate real estate broker” and “associate broker” means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under this chapter as a principal real estate broker.

(2) “Branch office” means a principal broker’s real estate brokerage office other than the principal broker’s main office.

(3) “Commission” means the Real Estate Commission established under this chapter.

(4) “Concurrence” means the entities given a concurring role must jointly agree for action to be taken.

(5) “Condominium” or “condominium unit” is as defined in Section 57-8-3.

(6) “Condominium homeowners’ association” means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as the principal broker's primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether the person's compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by.

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

X (14) "Real estate" includes leaseholds and business opportunities involving real property. \*

(15) "Real estate sales agent" and "sales agent" mean any person affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

(20) (a) "Undivided fractionalized long-term estate" means an ownership interest in real property by two or more persons that is a:

(i) tenancy in common; or

(ii) any other legal form of undivided estate in real property including:

(A) a fee estate;

(B) a life estate; or

(C) other long-term estate.

(b) "Undivided fractionalized long-term estate" does not include a joint tenancy.

X History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R.S. 1933, 82-2-2; L. 1939, ch. 106, § 1; C. 1943, 82-2-2; L. 1963, ch. 146, § 1; 1983, ch. 257, § 2; 1985, ch. 162, § 2; 1987, ch. 73, § 32; 1989, ch. 225, § 87; 1991, ch. 165, § 8; 1996, ch. 102, § 2; 1997, ch. 106, § 1; 2003, ch. 264, § 1; 2005, ch. 257, § 2.

Amendment Notes. — The 2003 amendment, effective May 5, 2003, rewrote Subsec-

tion (15) which read "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12)." \*

The 2005 amendment, effective May 2, 2005, added Subsection (20) and made stylistic changes in the section

### **61-2-5.5. Real Estate Commission created — Functions — Appointment — Qualification and terms of members — Expenses — Meetings.**

(1) There is created within the division a Real Estate Commission. The Commission shall:

(a) make rules for the administration of this chapter that are not inconsistent with this chapter, including:

(i) licensing of:

(A) principal brokers;

(B) associate brokers;

(C) sales agents;

(D) real estate companies; and

(E) branch offices;

THE  
UTAH CODE ANNOTATED  
1943



VOLUME 5

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## CHAPTER 2

## REAL ESTATE BROKERS

- |         |                                |          |                              |
|---------|--------------------------------|----------|------------------------------|
| 82-2-1. | License Required.              | 82-2-9.  | Broker's License — Fee —     |
| 82-2-2. | "Real Estate Broker" —         |          | Carries Right to Sales-      |
|         | "Real Estate" Defined.         |          | man's License—Expiration     |
| 82-2-3. | "Real Estate Salesman" De-     |          | —Renewal—Revocation.         |
|         | defined.                       | 82-2-10. | Salesman's Right to Commis-  |
| 82-2-4. | [Real Estate Broker or Sales-  |          | sion Restricted              |
|         | man] — One Act for Com-        | 82-2-11. | Revocation or Suspension of  |
|         | penensation Sufficient to Con- |          | License—Grounds.             |
|         | stitute.                       | 82-2-12. | Hearing Before Revocation    |
| 82-2-5. | Securities Commission to En-   |          | or Suspension.               |
|         | force Chapter.                 | 82-2-13. | Violation of Chapter Ground  |
| 82-2-6. | License — Application for —    |          | for Revocation.              |
|         | Bond—Recommendation.           | 82-2-14. | List of Licensees to Be Pub- |
| 82-2-7. | Id. Form—Posting—Pocket        |          | lished and Distributed.      |
|         | Cards.                         | 82-2-15. | Colonization Projects — Re-  |
| 82-2-8. | Termination of Salesman's      |          | ports on.                    |
|         | Employment — Notice —          | 82-2-16. | Id. Prerequisite to Sales.   |
|         | Return of License and          | 82-2-17. | Penalty for Violation of     |
|         | Card.                          |          | Chapter.                     |

## 82-2-1. License Required.

It shall be unlawful for any person, copartnership or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter.

(L. 21, p. 304, § 1.)

## History.

As amended by L. 39, ch. 106, eff. May 9, adding "copartnership or corporation" after "person" in first line and adding matter at end of second line.

## Comparable provisions.

Cal. Gen. Laws, Act 112, § 1 (identical, except that concluding words are as follows: " \* \* \* without first obtaining a license from the State Real Estate Division").

Idaho Code, § 53-2205, Mont. Rev. Codes, § 4060 (unlawful for any person to engage in business, or act in capacity of, real estate broker without first obtaining license).

Iowa Code 1939, § 1905.20 (requiring procurement of license from Iowa real estate commissioner).

## Cross-references.

Statute of frauds, brokers' contracts as within, 33-5-4, subd. (5).

## Decisions from other jurisdictions.

## — Iowa.

Written contract of exclusive agency for the sale of real estate held not to be construed as preventing the owner from

making a sale without liability for a commission. *Hedges Co. v. Shanahan*, 195 Iowa 1302, 190 N. W. 957.

Employment of broker to sell real estate is not a renunciation or abdication of owner's right to sell as an incident of his ownership. *Reeve v. Shoemaker*, 200 Iowa 983, 205 N. W. 742, 43 A. L. R. 839.

The existence of a contract of employment is essential to the right of a broker to a commission. *Reeve v. Shoemaker*, 200 Iowa 983, 205 N. W. 742, 43 A. L. R. 839.

A broker suing for commissions for making a land sale has the burden of proving (1) the contract of employment, (2) that he produced a purchaser ready, able and willing to purchase on terms satisfactory to defendant, (3) that plaintiff was efficient moving cause of sale, and (4) the implied contract to pay commission for services. *Wareham v. Atkinson*, 215 Iowa 1096, 247 N. W. 534.

## A. L. R. notes.

Constitutionality of statute or ordinance requiring real estate brokers to procure a license, 59 A. L. R. 1501.

## 82-2-2. "Real Estate Broker"—"Real Estate" Defined.

The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations,

foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

It is expressly provided that a real estate broker shall have the right to fill out and complete such statutory or securities commission approved forms of legal documents that may be necessary to any real estate transaction to which the said broker is a party as principal or agent.

\* The term "real estate" as used in this chapter shall include leaseholds and other interests less than leaseholds. (L. 29, p. 121, § 2.) \*

#### History.

As amended by L. 39, ch. 106, eff. May 9, making material changes in text and adding all matter after "real estate" in eighth line from end of first paragraph.

#### A. L. R. notes.

Authority of real estate broker to bind employer by representations to purchaser as to the character or condition of the property, 57 A. L. R. 111.

Broker from out of state as within ap-

plication and effect of statute relating to real estate brokers, 86 A. L. R. 640.

Broker's lien to secure his compensation for procuring sale of real estate, 58 A. L. R. 1497.

Duration of real estate broker's contract which specifies no time, 28 A. L. R. 893.

Duty of broker to inform principal of enhanced value of property, 53 A. L. R. 136.

Failure of title as fault or default of

# UTAH CODE ANNOTATED 1953

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE  
STATE IN FORCE AT THE CLOSE OF THE TWENTY-NINTH  
LEGISLATURE, REGULAR AND FIRST  
SPECIAL SESSIONS, 1951

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TEN VOLUMES

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COMPILED, ANNOTATED AND PUBLISHED UNDER  
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Edited by  
**CHARLES L. HOPPER, AB., LLB.**  
AND THE PUBLISHER'S EDITORIAL STAFF

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**VOLUME 7**  
Sales to Water and Irrigation

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**THE ALLEN SMITH COMPANY**  
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ing (1) the contract of employment, (2) that he produced a purchaser ready, able and willing to purchase on terms satisfactory to defendant, (3) that plaintiff was efficient moving cause of sale, and (4) the implied contract to pay commission for services. *Wareham v. Atkinson*, 215 Iowa 1096, 247 N. W. 534.

#### Collateral References.

Brokers  $\Rightarrow$  3.

12 C.J.S. Brokers § 8.

Real estate brokers, 8 Am. Jur. 1016, Brokers § 59 et seq.

Character and extent of liability on real estate broker's statutory bond, 17 A. L. R. 2d 1012.

Constitutionality of statute or ordinance requiring real estate brokers to procure a license, 59 A. L. R. 1501

61-2-2. "Real estate broker"—"Real estate" defined.—The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations, foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

It is expressly provided that a real estate broker shall have the right to fill out and complete such statutory or securities commission approved forms of legal documents that may be necessary to any real estate transaction to which the said broker is a party as principal or agent.



\* The term "real estate" as used in this chapter shall include leaseholds and other interests less than leaseholds. \*

History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R. S. 1933, 82-2-2; L. 1939, ch. 106, § 1; C. 1943, 82-2-2.

**Compiler's Note.**

The 1939 amendment made material changes in text and added the last sentence of the first paragraph.

**1. Construction and application.**

Plaintiff, who by oral agreement assisted licensed broker in obtaining listing of certain land, could not be deprived of his commission when land was sold by broker, since plaintiff was neither real estate broker as defined in this section nor real estate salesman as defined in 61-2-3. Anderson v. Johnson, 108 U. 417, 160 P. 2d 725.

**Collateral References.**

Brokers 2.  
12 C.J.S. Brokers § 1.

Authority of real estate broker to bind employer by representations to purchaser as to the character or condition of the property, 57 A. L. R. 111.

Broker from out of state as within application and effect of statute relating to real estate brokers, 86 A. L. R. 640.

Broker's lien to secure his compensation for procuring sale of real estate, 58 A. L. R. 1497.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 A. L. R. 2d 1410.

Duration of real estate broker's contract which specifies no time, 28 A. L. R. 893.

Duty of broker to inform principal of enhanced value of property, 53 A. L. R. 136.

Failure of title as fault or default of owner within exception in contractual provision denying broker's right to commissions if sale is not closed, 56 A. L. R. 913.

Liability of broker to purchaser for overstating lowest price at which owner is willing to sell, 8 A. L. R. 1383.

Liability of real estate agent or broker to employer because of unit character of purchaser or tenant procured by him, 60 A. L. R. 1379.

Real estate broker's rights and remedies in respect of property or proceeds for payment or security of his compensation, 125 A. L. R. 921.

Real estate broker's right to commissions as affected by owner's ignorance of fact that purchaser had been contacted by broker, 142 A. L. R. 275.

Real estate broker's right to commission where purchaser refuses to go through with executory contract because of reckless misrepresentation made to him by broker respecting property, 9 A. L. R. 2d 504.

Relative rights and liabilities of vendor and his broker to down payment or earnest money forfeited by vendee for default under real estate contract, 9 A. L. R. 2d 495.

Right of real estate broker to commissions where he was unable to procure an offer of the owner's price from one whom he interested, and who subsequently, without his intervention, purchased at that price, 9 A. L. R. 1194.

Right of real estate broker to list competing properties of different owners, 71 A. L. R. 699.

Skill and care required of real estate broker, 62 A. L. R. 1357.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee, 18 A. L. R. 2d 376.

Who is real estate agent, salesman, or broker within meaning of statute, 56 A. L. R. 480, 167 A. L. R. 774.

**61-2-3. "Real estate salesman" defined.**—The term "real estate salesman" shall mean and include any person employed or engaged by or on behalf of a licensed real estate broker to do or to deal in any act or transaction set out or comprehended by the definition of a real estate broker in section 61-2-2 for compensation or otherwise

History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R. S. 1933, 82-2-3; L. 1939, ch. 106, § 1; C. 1943, 82-2-3.

**Compiler's Notes.**

The 1939 amendment rewrote text of entire section.

The reference in this section to "section

61-2-2" appeared in Code 1943 as "section 82-2-2."

**1. Broker or salesman defined.**

One who merely assists a real estate broker to secure listings does not come within the provisions of our real estate brokers' law. He does not come within the definition of a real estate broker or

**L A W S**

of the

**STATE OF UTAH, 1963**

Passed by

**REGULAR SESSION**

of the

**THIRTY-FIFTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake

January 14, 1963

And Adjourned Sine Die on

March 14, 1963

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Published by Authority

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been filed, entered, or imposed under this act, but are governed by prior law.

(4) Prior law applies in respect of any offer or sale made within one year after the effective date of this act pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law.

(5) Judicial review of all administrative orders as to which review proceedings have not been instituted by the effective date of this act are governed by section 61-1-23, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within sixty days after the effective date of this act.

Approved March 21, 1963.

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## CHAPTER 146

H. B. No. 124.

(Passed March 14, 1963. In effect May 14, 1963.)

### REAL ESTATE BROKER

**An Act Relating to Real Estate Brokers, Providing That the Securities Commission May Issue Cease and Desist Orders and Seek Injunctive Relief for Violations of the Chapter; and Amending Sections 61-2-2, 61-2-5, 61-2-9, and 61-2-11, 61-2-19, Utah Code Annotated 1953, Relating to the Duties of Real Estate Brokers and Providing That Business Opportunities Shall Be Included in the Definition of Real Estate; Increasing Compensation of Board of Real Estate Examiners; Providing for Certain Changes in Fees; Providing that Brokers May Share Commissions With Licensed Brokers in Other Jurisdictions; and Adding Sections 61-2-21 and 61-2-22 to Prescribe Course of Action in Case of Violations and Savings Clause.**

*Be it enacted by the Legislature of the State of Utah:*

#### **Section 1. Sections Amended.**

Sections 61-2-2, 61-2-5, 61-2-6, 61-2-9 and 61-2-11, 61-2-19, Utah Code Annotated 1953, are amended to read:

#### **61-2-2. "Real Estate Broker"—"Real Estate" Defined.**

The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations, foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells

or offers to sell or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who shall sell or exchange or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee, in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of a will nor to their employees.

\* The term "real estate" as used in this chapter shall include leaseholds and business opportunities. \*

The term "business opportunity" as used in this Chapter shall mean and include an existing business, business and the good will attached thereto or any one or combination thereof.

#### 61-2-5. Securities Commission—Board of Real Estate Examiners.

(a) It shall be the duty of the State securities commission, herein referred to as the commission, to administer and provide for the enforcement of all provisions of this chapter. A board of real estate examiners, herein referred to as the board, and the office of real estate director, herein referred to as the director, are hereby established under the appointment, direction and supervision of the securities commission. The commission shall appoint a board of three real estate examiners, each of whom shall, for at least five years prior to the date of his appointment, have been engaged in the real estate business, and shall have been a licensed real estate broker in the State of Utah for three years next prior to his appointment. Not more than one member of the board shall be appointed from any one county in the state. The board members shall be appointed for terms of one year, two years and three years, upon creation of the board, and upon expiration of the respective terms, new appointments shall be made for terms of three years. The board of real estate examiners shall, upon its own motion or upon the verified complaint in writing of any person, cause to be made an investigation of the conduct of any licensee mentioned in the

**LAWS**  
of the  
**STATE OF UTAH, 1983**

Passed at the  
**REGULAR SESSION**  
of the  
**FORTY-FIFTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake  
January 10, 1983  
and Adjourned Sine Die on  
March 10, 1983  
and  
**FIRST SPECIAL SESSION**  
June 23rd, July 14, 15 and 21, 1983

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Published by Authority

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## CHAPTER 257

S. B. No. 178

(Passed March 10, 1983. In effect May 10, 1983.)

## DIVISION OF REAL ESTATE AMENDMENTS - SUNSET REVIEW

By Senator Carling

AN ACT RELATING TO REAL ESTATE; CLARIFYING THE ROLE OF THE DIVISION OF REAL ESTATE AND ITS DUTIES; MAKING CHANGES IN THE LICENSING OF BROKERS AND SALESMEN; PROVIDING FOR THE LICENSING OF PRINCIPAL BROKERS; AND PROVIDING TECHNICAL CHANGES.

THIS ACT AMENDS SECTIONS 61-2-1, 61-2-4, 61-2-7, 61-2-8, 61-2-10, 61-2-13, 61-2-14, 61-2-17, 61-2-18, AND 61-2-20, UTAH CODE ANNOTATED 1953, SECTION 61-2-2, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 146, LAWS OF UTAH 1963, SECTION 61-2-6, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 194, LAWS OF UTAH 1979, AND SECTIONS 61-2-9, 61-2-11, 61-2-12, AND 61-2-21, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 225, LAWS OF UTAH 1981; ENACTS SECTION 61-2-5.5, UTAH CODE ANNOTATED 1953; REPEALS AND REENACTS SECTION 61-2-3, UTAH CODE ANNOTATED 1953, AND SECTION 61-2-5, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 225, LAWS OF UTAH 1981; AND REPEALS SECTION 61-2-19, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 193, LAWS OF UTAH 1969.

*Be it enacted by the Legislature of the State of Utah:*

**Section 1. Section amended.**

Section 61-2-1, Utah Code Annotated 1953, is amended to read:

**61-2-1. License required.**

It ~~[shall be]~~ is unlawful for any person~~[-, copartnership or corporation]~~ to engage in the business, act in the capacity of, advertise or assume to act as a principal real estate broker, real estate broker, or a real estate salesman within this state without ~~[first obtaining]~~ a license obtained under ~~[the provisions of]~~ this chapter.

**Section 2. Section amended.**

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 146, Laws of Utah 1963, is amended to read:

**61-2-2. Definitions.**

As used in this chapter:

(1) ~~[The term]~~ "Principal real estate broker" and "principal broker" ~~[within the meaning of this chapter shall]~~ means: (a) ~~[include]~~ all persons~~[-, partnerships, associations and corporations, foreign and domestic,]~~ who for another and for ~~[a fee, commission or other]~~ valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting ~~[a fee, commission or other]~~ valuable consideration, sells, exchanges, purchases, rents or leases or negotiates the sale, exchange, purchase, rental or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements

thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate[-]; and (b) ~~[The term "real estate broker" shall also include]~~ any person, ~~[partnership, association or corporation]~~ employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who ~~[shall sell or exchange or offer or attempt or agree]~~ sells, exchanges or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

~~[The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforementioned with reference to property owned or leased by such person, partnership, association or corporation nor to isolated transactions by persons holding a duly executed power of attorney from the owner nor shall this chapter be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law nor shall it apply to a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court nor to a trustee under a deed of trust of (or) a will nor to their employees.]~~

(2) "Real estate broker" and "broker" means any person employed or engaged by or on behalf of a licensed principal real estate broker to perform any act set out in subsection (1) for valuable consideration, who has qualified under the provisions of this chapter as a real estate broker.

(3) "Real estate salesman" and "salesman" means any person employed or engaged by or on behalf of a licensed principal real estate broker to perform any act set out in subsection (1) for valuable consideration.

\* (4) [The term "real" "Real estate" [as used in this chapter shall include] includes leaseholds, [and] business opportunities, and all timeshare interests (including but not limited to fee simple, club membership, limited partnership, and beneficiary interests in a timeshare trust). \*

\* (5) [The term "business" "Business opportunity" [as used in this chapter shall mean and include] means an existing business, a business and [the] its good will, [attached thereto] a business franchise, or any [one or] combination[thereof] of them. \*

### Section 3. Section repealed and reenacted.

Section 61-2-3, Utah Code Annotated 1953, is repealed and reenacted to read:

#### 61-2-3. Exempt persons and transactions.

This chapter does not apply to: (1) any person who as owner or lessor performs the acts set out in section 61-2-2(1) with reference to property owned or leased by such person; (2) isolated transactions by persons holding a duly executed power of attorney from the owner; (3) services rendered by an attorney at law in performing his duties as an attorney at law; (4) a

**LAWS**  
of the  
**STATE OF UTAH, 1985**

Passed at the  
**GENERAL SESSION**  
of the  
**FORTY-SIXTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake  
January 14, 1985  
and Adjourned Sine Die on  
February 27, 1985

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Published by Authority

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## CHAPTER 162

## H. B. No. 284

Passed February 27, 1985

Effective April 29, 1985

## REAL ESTATE AMENDMENTS

By Richard J. Bradford

AN ACT RELATING TO THE SECURITIES COMMISSION; REVISING THE REAL ESTATE BROKERS CHAPTER; REDEFINING TERMS; REQUIRING THE DIVISION OF REAL ESTATE AND THE REAL ESTATE COMMISSION TO WORK IN CONCURRENCE WITH EACH OTHER; CHANGING THE APPLICATION REQUIREMENTS; REVISING NONRESIDENT LICENSURE REQUIREMENTS; CHANGING THE FORM OF THE LICENSE AND RENEWAL DATE; GIVING THE DIVISION SUBPOENA POWER IN INVESTIGATIONS; ADDING TO PROHIBITED CONDUCT; CHANGING SOME APPEAL PROCEDURES; PROVIDING FINES TO BE DEPOSITED IN THE REAL ESTATE RECOVERY FUND; REQUIRING FORM APPROVAL; PROVIDING FOR LICENSE FEE RENEWAL; LIMITING THE AMOUNT RECOVERABLE FROM THE REAL ESTATE RECOVERY FUND; AND PROVIDING FOR REVOCATION OF LICENSURE.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

## AMENDS:

- 61-2-1, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-2, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-3, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-4, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-5, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-5.5, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-6, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-7, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-8, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-9, AS LAST AMENDED BY CHAPTER 15, LAWS OF UTAH 1984, SECOND SPECIAL SESSION, WHICH TAKES EFFECT JULY 1, 1985
- 61-2-23, AS ENACTED BY CHAPTER 254, LAWS OF UTAH 1983

61-2-10, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-11, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-12, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-13, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-17, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-18, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-20, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-22, AS ENACTED BY CHAPTER 146, LAWS OF UTAH 1963

61-2-23, AS ENACTED BY CHAPTER 254, LAWS OF UTAH 1983

61-2a-4, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

61-2a-5, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

61-2a-9, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

*Be it enacted by the Legislature of the state of Utah:*

## Section 1. Section Amended.

Section 61-2-1, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read:

## 61-2-1. License required.

It is unlawful for any person to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate ~~salesman~~ sales agent within this state without a license obtained under this chapter.

## Section 2. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read:

## 61-2-2. Definitions.

As used in this chapter:

(1) "Principal real estate broker" and "principal broker" means:

(a) ~~all persons~~ any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises,

who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate, and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate

(2) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (1) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(3) "Real estate ~~[salesman]~~ sales agent" and "~~[salesman]~~ sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (1) for valuable consideration

\* (4) "Real estate" includes leaseholds, business opportunities, and all timeshare interests (including but not limited to fee simple, club membership, limited partnership, and beneficiary interests in a timeshare trust) involving real property

\* (5) "~~Business opportunity~~" means ~~an existing business, a business and its good will, a business franchise, or any combination of them~~ "Commission" means the Real Estate Commission established under this chapter

(6) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

(7) "Director" means the director of the Division of Real Estate

(8) "Division" means the Division of Real Estate

(9) "Executive director" means the director of the Department of Business Regulation

### Section 3. Section Amended.

Section 61-2-3, Utah Code Annotated 1953, as enacted by Chapter 257, Laws of Utah 1983, is amended to read

### 61-2-3 Exempt persons and transactions.

This chapter does not apply to

(1) any person who as owner or lessor performs the acts set out in ~~[section]~~ Subsection 61-2-2 (1) with reference to property owned or leased by such person,

(2) isolated transactions by persons holding a duly executed power of attorney from the owner,

(3) services rendered by an attorney at law in performing his duties as an attorney at law,

(4) a receiver, trustee in bankruptcy, administrator, or executor, or any person acting under order of any court,

(5) a trustee or its employees under a deed of trust or a will ~~[or their employees]~~, or

(6) any public utility or ~~[to]~~ the officers or regular employees thereof, unless performance of any of the acts set out in Subsection 61-2-2 (1) is in connection with the sale, purchase, lease, or other disposition of real estate or investment therein unrelated to the principal business activity of such public utility

### Section 4. Section Amended.

Section 61-2-4, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read

### 61-2-4. One act for compensation qualifies person as broker or sales agent.

One act, for valuable consideration, of buying, selling, leasing, or exchanging real estate for another, or of offering for another to buy, sell, lease, or exchange real estate, ~~[qualifies]~~ requires the person performing, offering, or attempting to perform the act to be licensed as a principal real estate broker, ~~[a]~~ an associate real estate broker, or a real estate ~~[salesman under]~~ sales agent as set forth in this chapter

### Section 5. Section Amended.

Section 61-2-5, Utah Code Annotated 1953, as enacted by Chapter 257, Laws of Utah 1983, is amended to read

### 61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of Business Regulation a Division of Real Estate. It is responsible for the administration and enforcement of this chapter, the Real Estate Education, Research, and Recovery Fund, and the Utah Uniform Land and Timeshare Sales Practices Act

(2) The division ~~[shall be]~~ is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director ~~[shall hold]~~ holds his office at the pleasure of the governor

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be

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**STATE OF UTAH**  
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interest in a project is essentially noncommercial. For purposes of this subsection, the offering of fewer than ten interests in a project is considered essentially noncommercial.

#### Section 32. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 162, Laws of Utah 1985, is amended to read:

#### 61-2-2. Definitions.

As used in this chapter:

~~[(2)]~~ (1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection ~~[(4)]~~ (7) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

~~[(5)]~~ (2) "Commission" means the Real Estate Commission established under this chapter.

~~[(6)]~~ (3) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

~~[(7)]~~ (4) "Director" means the director of the Division of Real Estate.

~~[(8)]~~ (5) "Division" means the Division of Real Estate.

~~[(9)]~~ (6) "Executive director" means the director of the Department of Business Regulation.

~~[(4)]~~ (7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

~~[(4)]~~ (8) "Real estate" includes leaseholds~~[-]~~ and business opportunities~~[-]~~ and ~~all timeshare interests~~

~~(including but not limited to fee simple, club membership, limited partnership, and beneficiary interests in a timeshare trust)]~~ involving real property.

~~[(3)]~~ (9) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection ~~[(4)]~~ (7) for valuable consideration.

#### Section 33. Section Amended.

Section 61-2-3, Utah Code Annotated 1953, as last amended by Chapters 162 and 235, Laws of Utah 1985, is amended to read:

#### 61-2-3. Exempt persons and transactions.

This chapter does not apply to:

(1) any person who as owner or lessor performs the acts set out in Subsection 61-2-2 ~~[(4)]~~ (7) with reference to property owned or leased by that person;

(2) isolated transactions by persons holding a duly executed power of attorney from the owner;

(3) services rendered by an attorney at law in performing his duties as an attorney at law;

(4) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(5) a trustee or its employees under a deed of trust or a will;

(6) any public utility or ~~[the]~~ its officers or regular employees ~~[of it]~~, unless performance of any of the acts set out in Subsection 61-2-2 ~~[(4)]~~ (7) is in connection with the sale, purchase, lease, or other disposition of real estate or investment ~~[therein]~~ in real estate unrelated to the principal business activity of that public utility; or

(7) any person registered to act as a broker-dealer, agent, or investment advisor under the Utah and federal securities laws in the sale of, or offer to sell, real estate where the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934 and which security is registered for sale pursuant to the Securities Act of 1933 or by the Utah Uniform Securities Act. This exemption does not apply to exempt or resale transactions.

**LAWS**  
**of the**  
**STATE OF UTAH**  
**passed at the**  
**1989 GENERAL SESSION**  
**of the**  
**FORTY-EIGHTH LEGISLATURE**

**Convened at the Capitol in the City of Salt Lake**  
**January 9, 1989**  
**and Adjourned Sine Die on**  
**February 22, 1989**

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shall serve until their respective successors are appointed and qualified.

(4) The board shall meet at least quarterly on a regular date to be fixed by the board and at such other times at the call of the director or any two members of the board. Four members shall constitute a quorum for the transaction of business. Actions of the board shall require a vote of a majority of those present.

(5) Each member of the board shall, by sworn and written statement filed with the Department of ~~[Business Regulation]~~ Commerce and the lieutenant governor, disclose any position of employment or ownership interest that the member has with respect to any entity or business subject to the jurisdiction of the division. This statement shall be filed upon appointment and must be appropriately amended whenever significant changes occur in matters covered by the statement.

(6) The members of the board shall receive no salary but shall be paid a per diem allowance, as provided by law, for each day actually spent in the performance of their duties, and travel expenses as allowed under Section 63-1-15 and the rules and regulations promulgated under that section.

#### Section 87. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 73, Laws of Utah 1987, is amended to read

#### 61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Commission" means the Real Estate Commission established under this chapter.

(3) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(4) "Director" means the director of the Division of Real Estate.

(5) "Division" means the Division of Real Estate.

(6) "Executive director" means the director of the Department of ~~[Business Regulation]~~ Commerce.

(7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or at-

tempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

(8) "Real estate" includes leaseholds and business opportunities involving real property

(9) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration.

#### Section 88. Section Amended.

Section 61-2-5, Utah Code Annotated 1953, as last amended by Chapter 182, Laws of Utah 1988, is amended to read:

#### 61-2-5. Division of Real Estate created — Functions — Director appointed — Functions.

(1) There is created within the Department of ~~[Business Regulation]~~ Commerce a Division of Real Estate. It is responsible for the administration and enforcement of this chapter, the Real Estate Education, Research, and Recovery Fund, the Utah Uniform Land Sales Practices Act, and the Timeshare and Camp Resort Act.

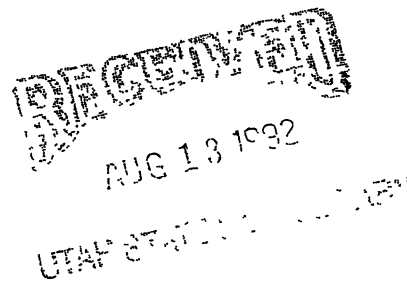
(2) The division is under the direction and control of a director appointed by the executive director of the department with the approval of the governor. The director holds his office at the pleasure of the governor.

(3) The director, with the approval of the executive director, may employ personnel necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Administrative Services.

(4) On or before the first day of October of each year the director shall, in conjunction with the department, report to the governor and the Legislature concerning the division's work for the preceding fiscal year ending June 30.

(5) The director, in conjunction with the executive director, shall prepare and submit to the governor

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**1991 FIRST SPECIAL SESSION**



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(2) a statement whether or not the developer has ever been

(a) convicted of a felony, or any misdemeanor involving theft, fraud, or dishonesty; or

(b) enjoined from, assessed any civil penalty for, or found to have engaged in the violation of any law designed to protect consumers

(3) a brief description of the developer's experience in timeshare, camp resort, or any other real estate development

(4) a brief description of the interest which is being offered in the project,

(5) a description of any provisions to protect the purchaser's interest from loss due to foreclosure on any underlying financial obligation of the project,

(6) a statement of the maximum number of interests in the project to be marketed, and a commitment that this maximum number will not be exceeded unless disclosed by filing an amendment to the registration as provided in Section 57-19-9 prior to the amendment becoming effective,

(7) any event which has occurred as of the date of the offer which may have a material adverse effect on the operation of the project, and

(8) any other information the director considers necessary for the protection of purchasers

#### Section 7. Section Amended.

Section 57-19-20, Utah Code Annotated 1953, as enacted by Chapter 73, Laws of Utah 1987, is amended to read

#### 57-19-20. Injunctive relief — Cease and desist order.

(1) Whenever it appears to the director that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter, and that it would be in the public interest to stop those acts or practices, the director may either

(a) seek injunctive relief as provided in Rule 65A, Utah Rules of Civil Procedure, or

(b) issue an administrative cease and desist order

(2) If an administrative cease and desist order is issued pursuant to Subsection (1), the person upon whom the order is served may, within ten days after receiving the order, request that a hearing be held before an administrative law judge. ~~[The director shall schedule the hearing within 15 days after receipt of the request from the person upon whom the order was served and give notice of the hearing in writing to him.]~~ If a request for a hearing is made, the division shall follow the procedures and requirements of Chapter 46b, Title 63, Administrative Procedures Act. Pending the hearing, the order remains in effect

(3) If, at the hearing, a finding is made that there has been a violation of this chapter, the director, with the concurrence of the executive director, may issue an order making the cease and desist order

permanent. If no hearing is requested and if the person fails to cease the act or practice or after discontinuing the act or practice again commences it, the director shall file suit in the district court of the county in which the act or practice occurred or where the person resides or carries on business, to enjoin and restrain the person from violating this chapter.

(4) Whether or not the director has issued a cease and desist order, the attorney general, in the name of the state or of the director, may bring an action in any court of competent jurisdiction to enjoin any act or practice constituting a violation of any provision of this chapter, and to enforce compliance with this chapter or any rule or order under this chapter. Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted.

#### Section 8. Section Amended.

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 225, Laws of Utah 1989, is amended to read

#### 61-2-2. Definitions.

As used in this chapter

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection ~~[(7)]~~ (9) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office

~~[(2)]~~ (3) "Commission" means the Real Estate Commission established under this chapter

~~[(3)]~~ (4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

~~[(4)]~~ (5) "Director" means the director of the Division of Real Estate

~~[(5)]~~ (6) "Division" means the Division of Real Estate

~~[(6)]~~ (7) "Executive director" means the director of the Department of Commerce

(8) "Main office" means the address which a principal broker designates with the division as his primary brokerage office

~~[(7)]~~ (9) "Principal real estate broker" and "principal broker" means ~~[(a)]~~ any person

(a) (1) who ~~[for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration,]~~ sells or lists for sale, buys, exchanges, ~~[purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rent]~~



~~al for the use of] real estate [or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in], options on real estate, or [the] improvements [thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate] on real estate with the expectation of receiving valuable consideration; or~~

~~(ii) who advertises, offers, attempts, or otherwise holds himself, itself, or themselves] out [as] to be engaged in the business [of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate] described in Subsection (i); [and]~~

~~(b) [any person,] employed by or on behalf of the owner [or owners of lots or other parcels] of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (a), whether his compensation is at a stated salary [or upon], a commission [or] basis, upon a salary and commission basis, or otherwise [to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.];~~

~~(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management by:~~

~~(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;~~

~~(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or~~

~~(iii) ordering or otherwise arranging for repairs to the real estate;~~

~~(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (a) and (c); and~~

~~(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.~~

~~[(8)] (10) "Real estate" includes leaseholds and business opportunities involving real property.~~

~~[(9)] (11) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection [(7) for valuable consideration] (9).~~

#### Section 9. Section Amended.

Section 61-2-3, Utah Code Annotated 1953, as last amended by Chapters 48 and 73, Laws of Utah 1987, is amended to read:

#### 61-2-3. Exempt persons and transactions.

This chapter does not apply to:

(1) any person who as owner or lessor performs the acts set out in Subsection 61-2-2 [(7)] (9) with reference to property owned or leased by that person or any regular salaried employee of that person, except that this exemption does not apply to employees engaged in sales of property intended for residential use or engaged in the sales of properties regulated under Chapter 11, Title 57, Utah Uniform Land Sales Practices Act, nor does it apply to any person whose interest as an owner or lessor was obtained by him or transferred to him for the purpose of evading the application of this chapter and not for any other legitimate business reason;

(2) isolated transactions by persons holding a duly executed power of attorney from the owner;

(3) services rendered by an attorney at law in performing his duties as an attorney at law;

(4) a receiver, trustee in bankruptcy, administrator, executor, or any person acting under order of any court;

(5) a trustee or its employees under a deed of trust or a will;

(6) any public utility, its officers, or regular employees, unless performance of any of the acts set out in Subsection 61-2-2 [(7)] (9) is in connection with the sale, purchase, lease, or other disposition of real estate or investment in real estate unrelated to the principal business activity of that public utility; or

(7) any person registered to act as a broker-dealer, agent, or investment advisor under the Utah and federal securities laws in the sale or the offer for sale of real estate, where the real estate is a necessary element of a "security" as that term is defined by the Securities Act of 1933 and the Securities Exchange Act of 1934 and which security is registered for sale pursuant to the Securities Act of 1933 or by [the] Chapter 1, Title 61, Utah Uniform Securities Act. This exemption does not apply to exempt or resale transactions.

#### Section 10. Section Amended.

Section 61-2-5.5, Utah Code Annotated 1953, as last amended by Chapter 48, Laws of Utah 1987, is amended to read:

#### 61-2-5.5. Real Estate Commission created — Functions — Appointment, qualifications, terms, and compensation of members — Meetings.

(1) There is created within the division a Real Estate Commission. The commission shall:

~~[(a) promulgate rules relating to the licensing and conduct of principal brokers, associate brokers, sales agents, real estate schools, and school instructors;]~~

(a) make rules for the administration of this chapter which are not inconsistent with this chapter, including:

(i) licensing of principal brokers, associate brokers, sales agents, real estate companies, and branch offices;

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**1996 GENERAL SESSION**  
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**1996 SECOND SPECIAL SESSION**

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## CHAPTER 102

## H. B. 102

Passed February 27, 1996

Approved March 11, 1996

Effective April 29, 1996

DIVISION OF  
REAL ESTATE AMENDMENTS

Sponsor Gerry A Adair

AN ACT RELATING TO THE DIVISION OF REAL ESTATE; ADDING CERTAIN DEFINITIONS; EXEMPTING CERTAIN PERSONS FROM LICENSING REQUIREMENTS; REVISING THE DUTIES OF THE REAL ESTATE COMMISSION; MODIFYING CERTAIN REQUIREMENTS FOR LICENSING; REVISING MANDATES IMPOSED ON BROKERS; CREATING A CAUSE OF ACTION FOR MISHANDLING OF TRUST FUNDS; AND MAKING TECHNICAL CORRECTIONS.

This act affects sections of Utah Code Annotated 1953 as follows

## AMENDS:

61-2-1, as last amended by Chapter 162, Laws of Utah 1985

61-2-2, as last amended by Chapter 165, Laws of Utah 1991

61-2-3, as last amended by Chapters 165 and 262, Laws of Utah 1991

61-2-4, as last amended by Chapter 162, Laws of Utah 1985

61-2-5 5, as last amended by Chapter 165, Laws of Utah 1991

61-2-9, as last amended by Chapter 313, Laws of Utah 1994

61-2-10, as last amended by Chapter 186, Laws of Utah 1995

61-2-11, as last amended by Chapter 146, Laws of Utah 1993

## ENACTS:

61-2-24, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah*

Section 1. Section 61-2-1 is amended to read:

## 61-2-1. License required.

(1) It is unlawful for any person to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent within this state without a license obtained under this chapter

(2) It is unlawful for any person outside the state to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent with respect to real estate located within the state without a license obtained under this chapter

Section 2. Section 61-2-2 is amended to read:

## 61-2-2. Definitions.

As used in this chapter

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection [(9)] (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office

(3) "Commission" means the Real Estate Commission established under this chapter

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity

[(5)] (8) "Director" means the director of the Division of Real Estate

[(6)] (9) "Division" means the Division of Real Estate

[(7)] (10) "Executive director" means the director of the Department of Commerce

[(8)] (11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office

[(9)] (12) "Principal real estate broker" and "principal broker" means any person

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration, or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (i),

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise,

(c) who, with the expectation of receiving valuable consideration, manages property owned

by another person or who advertises or otherwise holds himself out to be engaged in property management [by];

~~[(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;]~~

~~[(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or]~~

~~[(iii) ordering or otherwise arranging for repairs to the real estate;]~~

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections 12(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13)(a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel management unless the hotel is a condominium hotel; or

(ii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

~~[(10)]~~ (14) "Real estate" includes leaseholds and business opportunities involving real property.

~~[(11)]~~ (15) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection ~~[(9)]~~ (12).

(16)(a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

**Section 3. Section 61-2-3 is amended to read:**

**61-2-3. Exempt persons and transactions.**

~~[This]~~ (1) (a) Except as provided in Subsection (1)(b), a license under this chapter ~~[does]~~ is not ~~[apply to]~~ required for:

~~[(1)-(a)]~~ (i) any person who as owner or lessor performs the acts ~~[set out]~~ described in Subsection 61-2-2 ~~[(9)]~~ (12) with reference to property owned or leased by that person ~~[or any regular salaried employee of that person];~~

(ii) a regular salaried employee of the owner or lessor of real estate who, with reference to nonresidential real estate owned or leased by the employer, performs the acts enumerated in Subsections 61-2-2(12)(a) and (b);

(iii) a regular salaried employee of the owner of real estate who performs property management services with reference to real estate owned by the employer, except that the employee may only manage property for one employer;

(iv) a person who performs property management services for the apartments at which that person resides in exchange for free or reduced rent on that person's apartment;

(v) a regular salaried employee of a condominium homeowners' association who manages real property subject to the declaration of condominium that established the homeowners' association, except that the employee may only manage property for one condominium homeowners' association; and

(vi) a regular salaried employee of a licensed property management company who performs support services, as prescribed by rule, for the property management company.

(b) [the exemption in] Subsection (1)(a) does not ~~[apply to]~~ exempt from licensing:

~~[(i) employees engaged in the sale of property intended for residential use;]~~

~~[(ii)]~~ (i) employees engaged in the sale of properties regulated under Title 57, Chapter 11, Utah Uniform Land Sales Practices Act and Title 57, Chapter 19, Timeshare and Camp Resort Act.

~~[(iii)]~~ (ii) employees engaged in the sale of cooperative interests regulated under Title 57, Chapter 23, Real Estate Cooperative Marketing Act, or

**LAWS**  
**of the**  
**STATE OF UTAH**  
**passed at the**  
**1996 THIRD SPECIAL SESSION**  
**1997 GENERAL SESSION**  
**1997 FIRST SPECIAL SESSION**  
**and**  
**1997 SECOND SPECIAL SESSION**

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Publication Authorized by the Utah Legislature

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## CHAPTER 106

## S. B. 200

Passed March 4, 1997

Approved March 12, 1997

Effective May 5, 1997

NIGHTLY RENTAL PROPERTY  
MANAGERS

Sponsor: Alarik Myrin

AN ACT RELATING TO SECURITIES, REAL ESTATE DIVISION; AMENDING THE DEFINITION OF PROPERTY MANAGEMENT TO EXCLUDE RENTAL OF CERTAIN PUBLIC ACCOMMODATIONS FOR ANY PERIOD LESS THAN 30 CONSECUTIVE DAYS AND THE MANAGEMENT OF THESE RENTALS; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows:

## AMENDS:

61-2-2, as last amended by Chapter 102, Laws of Utah 1996

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 61-2-2 is amended to read:

## 61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management ~~[unless the hotel is a condominium hotel];~~ [or]

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30

consecutive days, and the management activities associated with these rentals; or

~~[(ii)]~~ (iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

**LAWS**  
of the  
**STATE OF UTAH**

passed at the

**2002 FIFTH SPECIAL SESSION**  
**2002 SIXTH SPECIAL SESSION**  
**2003 GENERAL SESSION**  
**2003 FIRST SPECIAL SESSION**

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**CHAPTER 264****S. B. 198**

Passed March 4, 2003

Approved March 21, 2003

Effective May 5, 2003

**DIVISION OF REAL ESTATE -  
DEFINITIONS AMENDMENTS**

Sponsor. John L. Valentine

This act modifies the Securities Division - Real Estate Division section of the Utah Code. The act establishes that a real estate sales agent may be engaged either as an independent contractor or as an employee of a licensed principal real estate broker. The act establishes that the relationship between a sales agent and broker is an independent contractor relationship unless there is clear and convincing evidence that the relationship was intended by the parties to be an employer employee relationship. The act makes technical changes to the renewal of a principal broker's, associate broker's, or sales agent's license. The act makes technical changes to the process of activating an inactive license.

This act affects sections of Utah Code Annotated 1953 as follows

**AMENDS:**

61-2-2, as last amended by Chapter 106, Laws of Utah 1997

61-2-9, as last amended by Chapter 351, Laws of Utah 1997

**ENACTS:**

61-2-25, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah:*

**Section 1. Section 61-2-2 is amended to read:**

**61-2-2. Definitions.**

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker

(2) "Branch office" means a principal broker's real estate brokerage office other than his main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as

a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate.

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as his primary brokerage office.

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration; or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether his compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected; or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include:

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" ~~[means] mean any person [employed or engaged as an independent contractor by or on behalf of] affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12).~~

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis.

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

(19) "Renewal" means extending a license for an additional licensing period on or before the date the license expires.

**Section 2. Section 61-2-9 is amended to read:**

**61-2-9. Examination and license fees --  
Renewal of licenses -- Education  
requirements -- Activation of inactive  
licenses -- Recertification -- Licenses of  
firm, partnership, or association --  
Miscellaneous fees.**

(1) (a) Upon filing an application for a principal broker, associate broker, or sales agent license examination, the applicant shall pay a nonrefundable fee as determined by the commission with the concurrence of the division under Section 63-38-3.2 for admission to the examination.

(b) A principal broker, associate broker, or sales agent applicant shall pay a nonrefundable fee as determined by the commission with the

concurrence of the division under Section 63-38-3.2 for issuance of an initial license or license renewal.

(c) Each license issued under this subsection shall be issued for a period of not less than two years as determined by the division with the concurrence of the commission.

(d) (i) Any new sales agent applicant shall submit fingerprint cards in a form acceptable to the division at the time the license application is filed and shall consent to a fingerprint background check by the Utah Bureau of Criminal Identification and the Federal Bureau of Investigation regarding the application.

(ii) The division shall request the Department of Public Safety to complete a Federal Bureau of Investigation criminal background check for each new sales agent applicant through the national criminal history system (NCIC) or any successor system.

(iii) The cost of the background check and the fingerprinting shall be borne by the applicant.

(e) (i) Any new sales agent license issued under this section shall be conditional, pending completion of the criminal background check. If the criminal background check discloses the applicant has failed to accurately disclose a criminal history, the license shall be immediately and automatically revoked.

(ii) Any person whose conditional license has been revoked under Subsection (1)(e)(i) shall be entitled to a post-revocation hearing to challenge the revocation. The hearing shall be conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(2) (a) A license expires if it is not renewed on or before its expiration date. Effective January 1, 1992, as a condition of renewal, each active licensee shall demonstrate competence by viewing an approved real estate education video program and completing a supplementary workbook, or complete 12 hours of professional education approved by the division and commission within each two-year renewal period. The division with the concurrence of the commission shall certify education which may include, but shall not be limited to, state conventions, home study courses, video courses, and closed circuit television courses. The commission with concurrence of the division may exempt a licensee from this education requirement for a period not to exceed four years upon a finding of reasonable cause and under conditions established by rule.

(b) For a period of 30 days after the expiration date, a license may be reinstated upon payment of a renewal fee and a late fee determined by the commission with the concurrence of the division under Section 63-38-3.2 and upon providing proof acceptable to the division and the commission of the licensee having completed the hours of education or demonstrated competence as required under Subsection (2)(a).

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**LAWS**  
of the  
**STATE OF UTAH**  
passed at the

**2004 FOURTH SPECIAL SESSION**  
**2005 GENERAL SESSION**  
**2005 FIRST SPECIAL SESSION**

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(S) in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

(ii) "Security" does not include any:

(A) insurance or endowment policy or annuity contract under which an insurance company promises to pay money in a lump sum or periodically for life or some other specified period;

(B) interest in a limited liability company in which the limited liability company is formed as part of an estate plan where all of the members are related by blood or marriage, there are five or fewer members, or the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company; or

(C) a whole long-term estate in real property;

(D) an undivided fractionalized long-term estate in real property that consists of ten or fewer owners;

(E) an undivided fractionalized long-term estate in real property that consists of more than ten owners if, when the real property estate is subject to a management agreement:

(A) the management agreement permits a simple majority of owners of the real property estate to not renew or to terminate the management agreement at the earlier of the end of the management agreement's current term, or 180 days after the day on which the owners give notice of termination to the manager;

(B) the management agreement prohibits, directly or indirectly, the lending of the proceeds earned from the real property estate or the use or pledge of its assets to any person or entity affiliated with or under common control of the manager; and

(C) the management agreement complies with any other requirement imposed by rule by the Real Estate Commission under Section 61-2-26.

(ii) For purposes of Subsection (1)(x)(ii)(B), evidence that members vote or have the right to vote or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company.

(y) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(i) "Undivided fractionalized long-term estate" means an ownership interest in real property by two or more persons that is a:

(A) tenancy in common; or

(B) any other legal form of undivided estate in real property including:

(I) a fee estate;

(II) a life estate; or

(III) other long-term estate.

(ii) "Undivided fractionalized long-term estate" does not include a joint tenancy.

(26)(a) (aa) (i) "Viatical settlement interest" means the entire interest or any fractional interest in any of the following that is the subject of a viatical settlement:

(4) (A) a life insurance policy; or

(4) (B) the death benefit under a life insurance policy.

(4b) (ii) "Viatical settlement interest" does not include the initial purchase from the viator by a provider of viatical settlements.

(bb) "Whole long-term estate" means a person or persons through joint tenancy owns real property through:

(i) a fee estate;

(ii) a life estate; or

(iii) other long-term estate.

(27) (cc) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive of legal holidays listed in Section 63-13-2.

(2) A term not defined in [Section 61-1-13] this section shall have the meaning as established by division rule. The meaning of a term neither defined in this section nor by rule of the division shall be the meaning commonly accepted in the business community.

(3) (a) This Subsection (3) applies to:

(i) the offer or sale of a real property estate exempted from the definition of security under Subsection (1)(x)(ii)(C); or

(ii) the offer or sale of an undivided fractionalized long-term estate that is the offer of a security.

(b) A person who, directly or indirectly receives compensation in connection with the offer or sale as provided in this Subsection (3) of a real property estate is not an agent, broker-dealer, investment adviser, or investor adviser representative under this chapter if that person is licensed under Chapter 2, Division of Real Estate, as:

(i) a principal real estate broker;

(ii) an associate real estate broker; or

(iii) a real estate sales agent.

(4) The list of real property estates excluded from the definition of securities under Subsection (1)(x)(ii)(C) is not an exclusive list of real property estates or interests that are not a security.

Section 2. Section 61-2-2 is amended to read:

61-2-2. Definitions.

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As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (12) for valuable consideration, who has qualified under ~~the provisions of~~ this chapter as a principal real estate broker.

(2) "Branch office" means a principal broker's real estate brokerage office other than ~~his~~ the principal broker's main office.

(3) "Commission" means the Real Estate Commission established under this chapter.

(4) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(5) "Condominium" or "condominium unit" is as defined in Section 57-8-3.

(6) "Condominium homeowners' association" means all of the condominium unit owners acting as a group in accordance with declarations and bylaws.

(7) (a) "Condominium hotel" means one or more condominium units that are operated as a hotel.

(b) "Condominium hotel" does not mean a hotel consisting of condominium units, all of which are owned by a single entity.

(8) "Director" means the director of the Division of Real Estate

(9) "Division" means the Division of Real Estate.

(10) "Executive director" means the director of the Department of Commerce.

(11) "Main office" means the address which a principal broker designates with the division as ~~his~~ the principal broker's primary brokerage office

(12) "Principal real estate broker" and "principal broker" means any person:

(a) (i) who sells or lists for sale, buys, exchanges, or auctions real estate, options on real estate, or improvements on real estate with the expectation of receiving valuable consideration, or

(ii) who advertises, offers, attempts, or otherwise holds himself out to be engaged in the business described in Subsection (12)(a)(i);

(b) employed by or on behalf of the owner of real estate or by a prospective purchaser of real estate who performs any of the acts described in Subsection (12)(a), whether ~~his~~ the person's compensation is at a stated salary, a commission basis, upon a salary and commission basis, or otherwise;

(c) who, with the expectation of receiving valuable consideration, manages property owned by another person or who advertises or otherwise

holds himself out to be engaged in property management;

(d) who, with the expectation of receiving valuable consideration, assists or directs in the procurement of prospects for or the negotiation of the transactions listed in Subsections (12)(a) and (c); and

(e) except for mortgage lenders, title insurance agents, and their employees, who assists or directs in the closing of any real estate transaction with the expectation of receiving valuable consideration.

(13) (a) "Property management" means engaging in, with the expectation of receiving valuable consideration, the management of property owned by another person or advertising or otherwise claiming to be engaged in property management by:

(i) advertising for, arranging, negotiating, offering, or otherwise attempting or participating in a transaction calculated to secure the rental or leasing of real estate;

(ii) collecting, agreeing, offering, or otherwise attempting to collect rent for the real estate and accounting for and disbursing the money collected, or

(iii) authorizing expenditures for repairs to the real estate.

(b) "Property management" does not include.

(i) hotel or motel management;

(ii) rental of tourist accommodations, including hotels, motels, tourist homes, condominiums, condominium hotels, mobile home park accommodations, campgrounds, or similar public accommodations for any period of less than 30 consecutive days, and the management activities associated with these rentals; or

(iii) the leasing or management of surface or subsurface minerals or oil and gas interests, if the leasing or management is separate from a sale or lease of the surface estate.

(14) "Real estate" includes leaseholds and business opportunities involving real property.

(15) "Real estate sales agent" and "sales agent" mean any person affiliated with a licensed principal real estate broker, either as an independent contractor or an employee as provided in Section 61-2-25, to perform for valuable consideration any act set out in Subsection (12).

(16) (a) "Regular salaried employee" means an individual who performs a service for wages or other remuneration, whose employer withholds federal employment taxes under a contract of hire, written or oral, express or implied.

(b) "Regular salaried employee" does not include a person who performs services on a project-by-project basis or on a commission basis

(17) "Reinstatement" means restoring a license that has expired or has been suspended.

(18) "Reissuance" means the process by which a licensee may obtain a license following revocation of the license.

Tab 4

U.C.A. 1953 § 25-5-4

**C**

West's Utah Code Annotated Currentness

Title 25. Fraud

Chapter 5. Statute of Frauds

**→ § 25-5-4. Certain agreements void unless written and signed**

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(b) every promise to answer for the debt, default, or miscarriage of another;

(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

→ (e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and

(f) every credit agreement.

(2)(a) As used in Subsection (1)(f) and this Subsection (2):

(i) (A) "Credit agreement" means an agreement by a financial institution to:

(I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action;

(II) otherwise extend credit; or

(III) make any other financial accommodation.

(B) "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

U.C.A. 1953 § 25-5-4

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means:

(A) a state or federally chartered:

(I) bank;

(II) savings and loan association;

(III) savings bank;

(IV) industrial bank; or

(V) credit union; or

(B) any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b) (i) Except as provided in Subsection (2) (e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement:

(A) is in writing;

(B) expresses consideration;

(C) sets forth the relevant terms and conditions; and

(D) is signed by the party against whom enforcement of the agreement would be sought.

(ii) For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (2) (b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The

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U.C.A. 1953 § 25-5-4

provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

(i) the debtor is provided with a written copy of the terms of the agreement;

(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and

(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Laws 1909, c. 72, § 1; Laws 1989, c. 257, § 1; Laws 1996, c. 182, § 24, eff. July 1, 1996; Laws 2004, c. 92, § 24, eff. March 17, 2004.

**Codifications** R.S. 1898, § 2467; C.L. 1907, § 2467; C.L. 1917, § 5817; R.S. 1933, § 33-5-4; C. 1943, § 33-5-4.

#### HISTORICAL AND STATUTORY NOTES

Laws 2004, c. 92, rewrote this section that formerly provided:

"The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

"(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

"(2) every promise to answer for the debt, default, or miscarriage of another;

"(3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

"(4) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

"(5) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation;

"(6) every credit agreement.

"(a) As used in Subsection (6):

"(i) "Credit agreement" means an agreement by a financial institution to lend, delay, or otherwise modify an obligation to repay money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation.

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U.C.A. 1953 § 25-5-4

"Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

"(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

"(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

"(iv) "Financial institution" means a state or federally chartered bank, savings and loan association, savings bank, industrial loan corporation, credit union, or any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

"(b) Except as provided in Subsection (6)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the party against whom enforcement of the agreement would be sought. For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

"(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (6)(b):

"(i) the rendering of financial advice by a creditor to a debtor;

"(ii) the consultation by a creditor with a debtor; or

"(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

"(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

"(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

"(i) the debtor is provided with a written copy of the terms of the agreement;

"(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and

"(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered."

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U.C.A. 1953 § 25-5-4

#### CROSS REFERENCES

Agreements void unless written and signed, statute of frauds, see § 25-5-4

#### RESEARCH REFERENCES

##### ALR Library

103 A.L.R. 833, Interest Created by Lease as Real Estate Within Provisions of Statute of Frauds Requiring Writing as Condition of Agent's or Broker's Right to Compensation or His Authority to Contract.

80 A.L.R. 1456, Sufficiency of Writing Under Statutes Requiring Agreements for the Payment of Commission, or Authorizing or Employing a Broker for the Sale or Purchase of Real Estate for Compensation or Commission, or a Memorandum...

##### Encyclopedias

46 Am. Jur. Trials 231, Alternative Dispute Resolution for Banks and Other Financial Institutions.

##### Treatises and Practice Aids

7 Causes of Action 485, Cause of Action by Real Estate Broker to Recover Commission.

Law of Fraudulent Transactions § 8:28, Commitment Letters.

Law of Lender Liability, The ¶ 1.02(3), Oral Loan Commitment.

Lender Liability: Law, Prac. & Prevention § 2:3, Oral Agreements to Lend.

Structuring and Drafting Commercial Loan Agreement ¶ 9.03(2)(A), State Statutes Barring Oral Commitments.

Williston on Contracts § 27:1, Generally.

442 Practising Law Institute Real Estate Law and Practice 893, Foreclosures, Title Transfers, and Modification Structures Part 1 Foreclosures, Title Transfers, and Modification Structures Part 2.

#### NOTES OF DECISIONS

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Nature and form of memorandum 4

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Tab 5

**—Grounds.****—Excusable neglect.**

A default certificate may be set aside upon grounds of excusable neglect. *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 377 P.2d 189 (1962).

While reliance on an attorney's assurances that one's rights are being protected could, in the appropriate circumstances, be seen as excusable neglect, trial court properly refused to excuse the neglect of a defendant who failed to establish that she was so represented. *Miller v. Bröcksmith*, 825 P.2d 690 (Utah Ct. App. 1992).

**—Judicial attitude.**

Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment, unless to do so would result in substantial prejudice or injustice to the adverse party. *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor*, 544 P.2d 876 (Utah 1975).

**—Movant's duty.**

Party who seeks to have a default judgment set aside must proffer some defense of at least sufficient ostensible merit to justify a trial on that issue. *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976).

**—Setting aside proper.**

Where plaintiff served defendant with a summons, and left a copy with the defendant which was not the same as the original, the court had jurisdiction but sufficient confusion was created so that a motion to set aside the default judgment should have been granted and the

defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

**Time for appeal.**

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955). (but see *Central Bank & Trust Co. v. Jensen*, supra, and Rule 58A(d).

**Cited in Utah Sand & Gravel Prods. Corp. v. Tolbert**, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Lund v. Brown*, 2000 UT 75, 11 P.3d 277.

## COLLATERAL REFERENCES

**Brigham Young Law Review.** — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

**Am. Jur. 2d.** — 46 Am. Jur. 2d Judgments § 265 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 187 to 218.

**A.L.R.** — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and

hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained, because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

**Rule 56. Summary judgment.**

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997; November 1, 2004.)

**Amendment Notes.** — The 2004 amendment substituted “move for summary judgment” for “move with or without supporting affidavits for a summary judgment in his favor” in Subdivisions (a) and (b), in Subdivision (c), deleted “filed and served” before “in accordance with” and substituted “Rule 7” for “CJA 4-501”, substituted “If” for “Should it appear to the

satisfaction of the court at any time that” at the beginning of the first sentence in Subdivision (g), and made stylistic changes throughout

**Compiler's Notes.** — This rule is similar to Rule 56, F R C P

**Cross-References.** — Contempt generally, §§ 78-7-18, 78-32-1 et seq

#### NOTES TO DECISIONS

Affidavit  
— Contents  
— Corporation  
— Experts  
— Extension of time to submit  
— Failure to submit

— Inconsistency with deposition  
— Necessity of opposing affidavits  
— Resting on pleadings  
— Objection  
— Sufficiency  
— Hearsay and opinion testimony

Tab 6

UTAH CODE, 1953  
TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION  
CHAPTER 2. DIVISION OF REAL ESTATE

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→ 61-2-5.5 Real Estate Commission created --Functions --Appointment, qualifications, and terms of members --Expenses.

(1) There is created within the division a Real Estate Commission. The commission shall:

(a) make rules for the administration of this chapter which are not inconsistent with this chapter, including:

(i) licensing of principal brokers, associate brokers, sales agents, real estate companies, and branch offices;

(ii) prelicensing and postlicensing education curricula, examination procedures, and the certification and conduct of real estate schools, course providers, and instructors;

(iii) proper handling of funds received by real estate licensees, and brokerage office procedures and recordkeeping requirements;

(iv) property management; and

(v) standards of conduct for real estate licensees;

(b) establish, with the concurrence of the division, all fees as provided in this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act;

(c) conduct all administrative hearings not delegated by it to an administrative law judge relating to the licensing of any applicant, conduct of any licensee, or the certification or conduct of any real estate school, course provider, or instructor regulated under this chapter;

(d) with the concurrence of the director, impose sanctions against licensees and certificate holders as provided in Section 61-2-11;

(e) advise the director on the administration and enforcement of any matters affecting the division and the real estate sales and property management industries;



## U.C.A. 1953 § 61-2-5.5

- (f) advise the director on matters affecting the division budget;
  - (g) advise and assist the director in conducting real estate seminars; and
  - (h) perform other duties as provided by this chapter and Title 61, Chapter 2a, Real Estate Recovery Fund Act.
- (2) (a) The commission shall be comprised of five members appointed by the governor and approved by the Senate.
- (b) Four of the commission members shall have at least five years' experience in the real estate business and shall hold an active principal broker, associate broker, or sales agent license.
- (c) One commission member shall be a member of the general public.
- (d) No more than one commission member may be appointed from any given county in the state.
- (3) (a) Except as required by Subsection (b), as terms of current commission members expire, the governor shall appoint each new member or reappointed member to a four-year term ending June 30.
- (b) Notwithstanding the requirements of Subsection (a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of commission members are staggered so that approximately half of the commission is appointed every two years.
- (c) A commission member may not serve more than one consecutive term.
- (d) Members of the commission shall annually select one member to serve as chair.
- (4) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.
- (5) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
- (b) Members may decline to receive per diem and expenses for their service.
- (6) The commission shall meet at least monthly. The director may call additional meetings at his discretion or upon the request of the chair or upon the written request of three or more commission members. Three members constitute a quorum for the transaction of business.

History: C. 1953, **61-2-5.5**, enacted by L. 1983, ch. 257, § 6; 1985, ch. 162, § 6; 1987, ch. 48, § 4; 1991, ch. 165, § 10; 1996, ch. 102, § 5; 1996, ch. 243, § 116.

U.C.A. 1953 § 61-2-5.5

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1996 amendment by ch. 102, effective April 29, 1996, substituted "of any applicant" for "or" in Subsection (1)(c); rewrote Subsection (1)(d) relating to administrative action against licensees and certificate holders; substituted "sales and property management industries" for "industry" in Subsection (1)(e); and made stylistic changes.

The 1996 amendment by ch. 243, effective April 29, 1996, rewrote and redesignated former Subsection (2) as Subsections (2) and (3), revising provisions relating to terms of members; added Subsection (4); rewrote and redesignated former Subsection (3) as Subsection (5); and made appropriate redesignations of subsections and stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

Delegation of powers.

-- Hearing examiner.

Subsection (1)(c) and § 61-2-12 codify the principles of administrative law that allow an administrative adjudicatory body to delegate its task, at least preliminarily, to a hearing examiner. In re License of Topik, 761 P.2d 32 (Utah Ct. App. 1988), cert. denied, 773 P.2d 45 (Utah 1989).

U.C.A. 1953 § 61-2-5.5

UT ST § 61-2-5.5

END OF DOCUMENT

Tab 7

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**UTAH  
ADMINISTRATIVE  
CODE  
ANNOTATED**

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***The Complete Administrative  
Rules of the State of Utah***

**2001 Edition**

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Compiled by

**The Utah Division of Administrative Rules  
Department of Administrative Services**

Michael O. Leavitt, *Governor*  
Raylene G. Ireland, *Executive Director of Administrative Services*  
Kenneth A. Hansen, *Director of Administrative Rules*  
Michael G. Broschinsky, *Administrative Code Editor*

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**Annotated by the Editorial Staff of the Publisher**

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to be served, the three day mailing period set forth in Section R156-78A-4(3) to be applied.

**References:** 78-14-12(1)(b).

**History:** 11923, NEW, see CPR; 11923, CPR, see CPR; 11923, CPR(2nd), 11/15/91; 16605, AMD, 02/01/95; 16700, NSC, 03/01/95; 18858, AMD, 05/16/97; 19939, 5YR, 09/16/97.



## **R162. Real Estate.**

- R162-1. Authority and Definitions.
- R162-2. Exam and License Application Requirements.
- R162-3. License Status Change.
- R162-4. Office Procedures - Real Estate Principal Brokerage.
- R162-5. Property Management.
- R162-6. Licensee Conduct.
- R162-7. Enforcement.
- R162-8. Prelicensing Education.
- R162-9. Continuing Education.
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- R162-101. Authority and Definitions.
- R162-102. Application Procedures.
- R162-103. Appraisal Education Requirements.
- R162-104. Experience Requirement.
- R162-105. Scope of Authority.
- R162-106. Professional Conduct.
- R162-107. Unprofessional Conduct.
- R162-109. Administrative Proceedings.

### **R162-1. Authority and Definitions.**

- R162-1-1. Authority.
- R162-1-2. Definitions.

#### **R162-1-1. Authority.**

1.1. The following administrative Rules, applicable to the Division of Real Estate, Department of Commerce have been established under the authority granted by Section 61-2-5.5, et seq.

1.1.1. The Division shall charge and collect fees for the (a) issuance of a new or duplicate license; (b) issuance of license history or certifications; (c) issuance of certified copies of official documents, orders, and other papers and transcripts; (d) certification of real estate schools, courses and instructors; and (e) costs of administering other duties.

1.1.2. The authority to collect the above fees is authorized by Section 61-2-9(5) and Section 61-2a-4.

#### **R162-1-2. Definitions.**

1.2. Terms used in these rules are defined as follows:

1.2.1. Active Licensee: One who: (a) has paid all applicable license fees; and (b) is affiliated with a principal brokerage.

1.2.2. Branch Manager: An associate broker who manages a branch office under the supervision of the principal broker.

1.2.3. Branch Office: A real estate office affiliated with and operating under the same name as a Principal Brokerage but located at an address different from the main office.

1.2.4. Business Opportunity: The sale, lease, or exchange of any business which includes an interest in real estate.

1.2.5. Brokerage: A real estate sales brokerage or a property management company.

1.2.6. Certification: The authorization issued by the Division to: (a) establish and operate a real estate school which provides courses approved for licensing requirements, (b) provide courses approved for renewal requirements, or (c) function as a real estate instructor.

1.2.7. Company Registration: A Registration issued to a corporation, partnership, Limited Liability Company, association or other legal entity of a real estate brokerage. A Company Registration is also issued to an individual or an individual's professional corporation.

1.2.8. Continuing Education: Professional education required as a condition of renewal in accordance with Subsection 61-2-9(2)(a).

1.2.9. Expired License: A license will be deemed "expired" when the licensee fails to pay the fees due by the close of business on the expiration date. If the expiration date falls on a Saturday, Sunday or holiday the effective date of expiration shall be the next business day.

1.2.10. Inactivation: The placing of a license on an inactive status, either voluntarily or involuntarily.

1.2.10.1. Voluntary inactivation means the process initiated by an active licensee terminating affiliation with a principal brokerage.

1.2.10.2. Involuntary inactivation means the process of (a) inactivation of a sales agent or associate broker license resulting from the suspension, revocation, or non-renewal of the license of the licensee's principal broker, or death of the licensee's principal broker, or (b) inactivation of a sales agent or associate broker license by a principal broker when the licensee is unavailable to execute the transfer forms.

1.2.11. Inactive Licensee: One who: (a) has paid all applicable license fees; and (b) is not affiliated with a principal brokerage.

1.2.12. Net listing means a listing wherein the amount of real estate commission is the difference between the selling price of the property and a minimum price set by the seller.

1.2.13. Non-resident Licensee: A person who holds a Utah real estate principal broker, associate broker, or sales agent license whose primary residence is in a jurisdiction other than Utah.

1.2.14. Principal Brokerage: The main real estate or property management office of a principal broker.

1.2.15. Property Management: The business of providing services relating to the rental or leasing of real property, including: advertising, procuring prospective tenants or lessees, negotiating lease or rental terms, executing lease or rental agreements, supervising repairs and maintenance, collecting and disbursing rents.

1.2.16. Regular Salaried Employees: For purposes of this Chapter, "regular salaried employee" shall mean an individual employed other than on a contract basis, who has withholding taxes taken out by the employer.

1.2.17. Reinstatement: To restore to active or inactive status, a license which has expired or been suspended.

1.2.18. Reissuance: The process by which a licensee may obtain a license following revocation.

1.2.19. Renewal: To extend an active or inactive license for an additional licensing period.

1.2.20. DBA (doing business as): The authority issued by the Division of Corporations and Commercial Code to transact business under an assumed name.

1.2.21. Real Estate Sales Agent or Sales Agent: Any person employed or engaged as an independent contractor by or on behalf of a licensed Principal Broker to provide the acts set out in Subsections 61-2-2(12) or 61-2-2(13).

**References:** 61-2-5.5.

**History:** 9150, PRO, 01/01/88; 10290, AMD, 01/02/90; 10378, NSC, 12/18/89; 11294, AMD, 12/17/90; 11536, AMD, 03/04/91; 11982, AMD, 09/03/91; 15497, AMD, 03/03/94; 15539, AMD, 03/17/94; 19592, 5YR, 07/01/97; 20798, AMD, 04/23/98.

**NOTES TO DECISIONS**

**Cited.**

For cases citing this rule or similar former rules, see *Wardley Corp. v. Welsh*, 962 P.2d 86 (Utah Ct. App. 1998).

**R162-2. Exam and License Application Requirements.**

R162-2-1. Exam Application.  
R162-2-2. Licensing Procedure.  
R162-2-3. Company Registration.  
R162-2-4. Licensing of Non-Residents.  
R162-2-5. Reciprocity.

**R162-2-1. Exam Application.**

2.1. Any person 18 years of age or older desiring to become a licensed broker or sales agent shall deliver an application for examination together with the applicable examination fee to the testing service designated by the Division. If the applicant fails to take the scheduled examination, the fee will be forfeited.

**2.1.1. Applicants previously licensed out-of-state**

(a) If an applicant is now and has been actively licensed for the preceding two years in another state which has substantially equivalent licensing requirements and is either a new resident or a non-resident of this state, the Division shall waive the national portion of the exam.

(b) If an applicant has been on an inactive status for any portion of the past two years he may be required to take both the national and Utah state portions of the exam.

**R162-2-2. Licensing Procedure.**

2.2. Within 90 days after successful completion of the exam, the applicant shall return to the Division *each of the following:*

2.2.1. A report of the examination indicating that both portions of the exam have been passed within a six-month period of time.

2.2.2. The license application form required by the Division. The application form shall include the licensee's business and home address. A post office box without a street address is unacceptable as a business or home address. The licensee may designate any address to be used as a mailing address.

2.2.3. The non-refundable fees which will include the appropriate license fee as authorized by Section 61-2-9(5) and the Recovery Fund fee as authorized by Section 61-2a-4.

2.2.4. Documentation indicating successful completion of the required education taken within the year prior to licensing. If the applicant has been previously

licensed in another state which has substantially equivalent licensing requirements, he may apply to the Division for a waiver of all or part of the educational requirement.

2.2.4.1. Candidates for the license of sales agent will successfully complete 90 classroom hours of approved study in principles and practices of real estate. Experience will not satisfy the education requirement. Membership in the Utah State Bar will waive this requirement.

2.2.4.2. Candidates for the license of associate broker or principal broker will successfully complete 120 classroom hours of approved study consisting of at least 24 classroom hours in brokerage management, 24 classroom hours in advanced appraisal, 24 classroom hours in advanced finance, 24 hours in advanced property management and 24 classroom hours in advanced real estate law. Experience will not satisfy the education requirement. The Division may waive all or part of the educational requirement by virtue of equivalent education.

2.2.5. The principal broker and associate broker applicant will submit the forms required by the Division documenting a minimum of three years licensed real estate experience and a total of at least 60 points accumulated within the five years prior to licensing. A *minimum of two years (24 months) and at least 45 points* will be accumulated from Tables I and/or II. The remaining 15 points may be accumulated from Tables I, II or III.

**TABLE I - REAL ESTATE TRANSACTIONS**

RESIDENTIAL - points can be accumulated from either the selling or the listing side of a real estate closing:

(a) One unit dwelling	2.5 points
(b) Two- to four-unit dwellings	5 points
(c) Apartments, 5 units or over	10 points
(d) Improved lot	2 points
(e) Vacant land/subdivision	10 points

**COMMERCIAL**

(f) Hotel or motel	10 points
(g) Industrial or warehouse	10 points
(h) Office building	10 points
(i) Retail building	10 points
(j) Leasing of commercial space	5 points

**TABLE II - PROPERTY MANAGEMENT**

(a) Each unit managed	.25 pt/month
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COMMERCIAL - hotel/motel, industrial/warehouse, office, or retail building

(b) *Each contract OR each separate* property address or location for property address or location for which licensee has direct responsibility

1 pt/month

2.2.6. The Principal Broker may accumulate additional experience points by having participated in real estate related activities such as the following:

**TABLE III - OPTIONAL**

Real Estate Attorney	1 pt/month
CPA-Certified Public Accountant	1 pt/month
Mortgage Loan Officer	1 pt/month
Licensed Escrow Officer	1 pt/month
Licensed Title Agent	1 pt/month
Designated Appraiser	1 pt/month

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Licensed General Contractor	1 pt/month
Bank Officer in Real Estate Loans	1 pt/month
Certified Real Estate Prelicensing Instructor	.5 pt/month

2.2.7. If the review of an application has been performed by the Division and the Division has denied the application based on insufficient experience, and if the applicant believes that the Experience Points Tables do not adequately reflect the amount of the applicant's experience, the applicant may petition the Real Estate Commission for reevaluation by making a written request within 30 days after the denial stating specific grounds upon which relief is requested. The Commission shall thereafter consider the request and issue a written decision.

2.2.8. An applicant previously licensed in another state will provide a written record of his license history from that state and documentation of disciplinary action, if any, against his license.

2.2.9. Determining fitness for licensure. The Commission and the Division will consider information necessary to determine whether an applicant meets the requirements of honesty, integrity, truthfulness, reputation and competency, which shall include the following:

2.2.9.1. Whether an applicant has been denied a license to practice real estate, property management, or any regulated profession, business, or vocation, or whether any license has been suspended or revoked or subjected to any other disciplinary sanction by this or another jurisdiction;

2.2.9.2. Whether an applicant has been guilty of conduct or practices which would have been grounds for revocation or suspension of license under Utah law had the applicant then been licensed;

2.2.9.3. Whether a civil judgment has been entered against the applicant based on a real estate transaction, and whether the judgment has been fully satisfied;

2.2.9.4. Whether a civil judgment has been entered against the applicant based on fraud, misrepresentation or deceit, and whether the judgment has been fully satisfied.

2.2.9.5. Whether restitution ordered by a court in a criminal conviction has been fully satisfied;

2.2.9.6. Whether the probation in a criminal conviction or a licensing action has been completed and fully served; and

2.2.9.7. Whether there has been subsequent good conduct on the part of the applicant. If, because of lapse of time and subsequent good conduct and reputation or other reason deemed sufficient, it shall appear to the Commission and the Division that the interest of the public will not likely be in danger by the granting of a license, the Commission and the Division may approve the applicant relating to honesty, integrity, truthfulness, reputation and competency.

#### **R162-2-3. Company Registration.**

2.3.1. A Principal Broker shall register with the Division the name under which his real estate brokerage or property management company will operate. Registration will require payment of applicable non-refundable fees and evidence that the name of the new company has been approved by the Division of Corporations, Department of Commerce.

2.3.1.1. The real estate brokerage shall at all times have affiliated with it a principal broker who shall

demonstrate that he is authorized to use the company name.

2.3.1.2. Misleading or deceptive business names. The Division will not accept a proposed business name when there is a substantial likelihood that the public will be misled by the name into thinking that they are not dealing with a licensed real estate brokerage or property management company.

2.3.2. Registration of Entities Operating a Principal Brokerage.

2.3.2.1. A corporation, partnership, Limited Liability Company, association or other entity which operates a principal brokerage shall comply with R162-2.3 and the following conditions:

2.3.2.2. Individuals associated with the entity shall not engage in activity which requires a real estate license unless they are affiliated with the principal broker and licensed with the Division. Upon a change of principal broker, the entity shall be responsible to insure that the outgoing and incoming principal brokers immediately provide to the Division, on forms required by the Division, evidence of the change.

2.3.2.2.1. If the outgoing principal broker is not available to properly execute the form required to effect the change of principal brokers, the change may still be made provided a letter advising of the change is mailed by the entity by certified mail to the last known address of the outgoing principal broker. A verified copy of the letter and proof of mailing by certified mail shall be attached to the form when it is submitted to the Division.

2.3.2.3. If the change of members in a partnership either by the addition or withdrawal of a partner creates a new legal entity, the new entity cannot operate under the authority of the registration of the previous partnership. The dissolution of a corporation, partnership, Limited Liability Company, association or other entity which has been registered terminates the registration. The Division shall be notified of any change in a partnership or dissolution of a corporation which has registered prior to the effective date of the change.

#### **R162-2-4. Licensing of Non-Residents.**

2.4. In addition to meeting the requirements of rules 2.1 and 2.2, an applicant living outside of the state of Utah may be issued a license in Utah by successfully completing specific educational hours required by the Division with the concurrence of the Commission, and by passing the real estate licensing examination. The applicant shall also meet each of the following requirements:

2.4.1. If the applicant is an associate broker or sales agent, the principal broker with whom he will be affiliated shall hold an active license in Utah.

2.4.2. If the applicant is a principal broker, he shall establish a real estate trust account in this state. He shall also maintain all office records in this state at a principle business location as outlined in R162-4.1.

2.4.3. The application for licensure in Utah shall be accompanied by an irrevocable written consent allowing service of process on the Commission or the Division.

2.4.4. The applicant shall provide a written record of his license history, if any, and documentation of disciplinary action, if any, against his license.

#### **R162-2-5. Reciprocity.**

2.5. The Division, with the concurrence of the Commission, may enter into specific reciprocity agree-

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ments with other states on the same basis as Utah licensees are granted licenses by those states.

**References:** 61-2-5.5.

**History:** 9020, PRO, 12/01/87; 10374, NSC, 12/14/89; 10378, NSC, 12/18/89; 11295, AMD, 12/17/90; 11537, AMD, 03/04/91; 11983, AMD, 10/18/91; 12227, AMD, 12/16/91; 12469, AMD, 03/16/92; 13165, AMD, 09/14/92; 15498, AMD, 03/03/94; 17709, AMD, 06/04/96; 19593, 5YR, 07/01/97; 20799, AMD, 04/23/98; 21967, AMD, 06/03/99.

### R162-3. License Status Change.

R162-3-1. Status Changes.

R162-3-2. Unavailability of Licensee.

R162-3-3. Transfers.

R162-3-4. Inactivation.

R162-3-5. Activation.

R162-3-6. Renewal.

#### R162-3-1. Status Changes.

3.1. A licensee must notify the Division within ten working days of any status change. Status changes are effective on the date the properly executed forms and appropriate non-refundable fees are received by the Division. Notice must be on the forms required by the Division.

3.1.1. Change of name requires submission of official documentation such as a marriage or divorce certificate, or driver's license.

3.1.2. Change of business, home address or mailing address requires written notification. A post office box without a street address is unacceptable as a business or home address. The licensee may designate any address to be used as a mailing address.

3.1.3. Change of name of a brokerage must be accompanied by evidence that the new name has been approved by the Division of Corporations, Department of Commerce.

3.1.4. Change of Principal Broker of a real estate brokerage which is a sole proprietorship, requires closure of the registered entity. The new principal broker will activate the Registered Company and provide proof from the Division of Corporations of the authorization to use the DBA. Change cards will be required for the terminating Principal Broker, new Principal Broker and all licensees affiliated with the brokerage.

3.1.5. Change of a Principal Broker within an entity which is not a sole proprietorship requires written notice from the entity signed by both the terminating Principal Broker and the new Principal Broker.

#### R162-3-2. Unavailability of Licensee.

3.2. If a licensee is not available to properly execute the form required for a status change, the status change may still be made provided a letter advising of the change is mailed by certified mail to the last known address of the unavailable licensee. A verified copy of the letter and proof of mailing by certified mail must be attached to the form when it is submitted to the Division.

#### R162-3-3. Transfers.

3.3. Prior to transferring from one principal broker to another principal broker, the licensee must mail or deliver to the Division written notice of the change on the form required by the Division.

#### R162-3-4. Inactivation.

3.4. To voluntarily inactivate a license, the licensee must deliver or mail to the Division a written request for the change signed by both the licensee and principal broker.

3.4.1. Prior to placing his license on an inactive status, a principal broker must provide written notice to each licensee affiliated with him of that licensing status change. Evidence of that written notice must be provided to the Division in order to process the status change. The inactivation of the license of a principal broker will also cause the licenses of all affiliated licensees to be immediately inactivated if they do not transfer their licenses in accordance with R162-3.3 prior to the effective date of the principal broker's status change.

3.4.2. The non-renewal, suspension, or revocation of the license of a principal broker will cause the licenses of all affiliated licensees to be immediately inactivated if they do not transfer their licenses in accordance with R162-3.3 prior to the effective date of the principal broker's status change.

3.4.2.1. When a principal broker is notified that his license will be suspended or revoked, he must, prior to the effective date of the suspension or revocation, provide written notice to each licensee affiliated with him of that status change. In addition, the Division shall send written notice to each sales agent, associate broker, or branch broker of the effective date of inactivation and the process for transfer.

3.4.3. The principal broker may involuntarily inactivate the license of the sales agent or associate broker by complying with R162-3.2.

#### R162-3-5. Activation.

3.5. All licensees changing to active status must submit to the Division the applicable non-refundable activation fee and a written request for activation on the form required by the Division. If the license has been on an "inactive" status in excess of one year, the licensee must provide to the Division a certificate evidencing completion of the education or examination requirements set forth in Section 61-2-9. At the time of the licensee's next renewal, education which was used to activate the license may not be used again for continuing education purposes.

#### R162-3-6. Renewal.

3.6. A license renewal notice shall be sent by the Division to the licensee at the mailing address shown on the division records. The licensee must return the completed renewal notice, proof of completion of 12 hours of continuing education and the applicable non-refundable renewal fee to the Division on or before the expiration shown on the notice. Renewal of an active Principal Broker license requires certification that the business name under which the licensee is operating is still current and in good standing with the Division of Corporations and that all real estate trust accounts are current.

3.6.1. If the renewal fee and documentation are not received within the prescribed time period, the license shall expire.

3.6.2. When an active license expires, the licensee's affiliation with a principal brokerage automatically terminates. The license may be renewed for a period of thirty days after the expiration date upon payment of a non-refundable late fee in addition to the requirements of R162-3.5 and R162-3.6.

3.6.3. After this 30-day period and until six months after the expiration date the license may be reinstated



by paying a non-refundable reinstatement fee, and providing proof of satisfactory completion of the Utah portion of the prelicensing education required under Section 61-2-6 or passing the Utah portion of the real estate examination, in addition to the requirements of R162-3.5 and R162-3.6.

3.6.4. A principal broker's failure to renew his license when due, which causes the licenses of those affiliated with him to be placed on an inactive status, shall be separate grounds for disciplinary action against the principal broker.

3.6.5. If the Division has received a licensee's renewal documents in a timely manner but the information is incomplete, the licensee shall be extended a 15-day grace period to complete the application.

3.6.6. Education credit will be given for a course taken in another state provided the course has been certified for continuing education purposes in another state. These courses shall meet the Utah requirement of protection of the public, except that credit will not be given for education where the subject matter pertains to another state's license laws.

3.6.6.1. Prior approval must be obtained from the division before credit will be granted. Evidence must be provided to the Division that the course was certified by another licensing jurisdiction at the time the course was taken.

**References:** 61-2-5.5.

**History:** 9148, PRO, 01/01/88; 10021, AMD, 07/17/89; 10291, AMD, 01/02/90; 10378, NSC, 12/18/89; 11296, AMD, 12/17/90; 11538, AMD, 03/04/91; 12478, AMD, 03/16/92; 15499, NSC, 03/01/94; 17425, NSC, 12/01/95; 17710, AMD, 06/04/96; 19594, 5YR, 07/01/97; 20800, AMD, 04/23/98.

**R162-4. Office Procedures - Real Estate Principal Brokerage.**

R162-4-1. Records and Copies of Documents.

R162-4-2. Trust Accounts.

R162-4-3. Branch Office.

**R162-4-1. Records and Copies of Documents.**

4.1. The principal broker must maintain in his office and make available for inspection and copying by the Division all records pertaining to a real estate transaction for a period of at least three calendar years following the year in which an offer was rejected or the transaction either closed or failed.

4.1.1. Location of Records. Unless otherwise authorized by the Division in writing, the business records of the principal broker shall be maintained at his principal business location or, where applicable, at the branch office. If a brokerage closes its operation the principal broker must, within ten days after the closure, notify the Division in writing of where the records will be maintained in order to comply with R162-4.1 above. If a brokerage files for bankruptcy, the principal broker must, upon filing, notify the Division in writing of the filing and the current location of brokerage records.

4.1.2. Transaction Identification. All transactions, whether pending, closed or failed, must be numbered consecutively and identifiable in a manner that, in the opinion of the representative of the Division, the transaction can be readily followed in all pertinent documents. A sequential transaction number is to be

assigned to every offer, and a separate transaction file is to be maintained for every offer, including rejected offers involving funds deposited to the brokerage trust account. A sequential transaction number need not be assigned to rejected offers which do not involve funds deposited to trust. The principal broker may, at his option, maintain a separate transaction file for each rejected offer which does not involve funds deposited to trust or keep such rejected offers in a single file.

4.1.3. Statement of Account. At the expiration of 30 days after an offer has been made by a buyer and accepted by a seller, either party may demand, and the principal broker must furnish, a detailed statement showing the current status of the transaction. On demand by either party, the principal broker must furnish an updated statement at 30-day intervals thereafter until the transaction is closed.

4.1.4. Closing Statements. A principal broker charged with closing a sale shall cause to be prepared and delivered to the buyer and seller, upon completion of a transaction, a detailed closing statement of all their respective accounts showing receipts and disbursement.

4.1.4.1. Closing statements for all real estate transactions in which a real estate principal broker participates must show the following: the date of closing; the total purchase price of the property; an itemization of all adjustments, money, or things of value received or paid, and to whom each item is credited or debited. The dates of the adjustments must be shown if they are not the same as the date of the closing. Also shown must be the balances due from the respective parties to the transaction, and the names of the payees, makers, and assignees of all notes paid, made, or assumed. The statements furnished to each party to the transaction must contain an itemization of credits and debits as pertain to each party.

4.1.4.2. The principal broker or his authorized representative must attend all closings. The principal broker is responsible for the content and accuracy of all closing statements regardless of who closes the transaction.

4.1.4.3. The principal broker closing the transaction must show proof of delivery of the closing statement to the buyer and seller. Signatures of the buyer and seller on the file copy of the closing statement or a copy of a transmittal letter sent by certified mail, return receipt requested, when signatures are not attainable, will satisfy this requirement.

4.1.5. Death or Disability of Principal Broker: Upon the death or inability of a principal broker to act as a principal broker the following procedures shall apply:

4.1.5.1. In the case of a corporation, partnership, Limited Liability Company, association, or other legal entity the provisions of R162-2-2.3.2. shall apply.

4.1.5.2. In the case of a sole proprietor all brokerage activity must cease and a family attorney or representative shall: (1) notify the Division and all licensees affiliated with the principal broker in writing of the date of death or disability; (2) advise the Division as to the location where records will be stored; (3) notify each listing and management client in writing to the effect that the principal broker is no longer in business and that the client may enter a new listing or management agreement with the firm of his choice; (4) notify each party and cooperating broker to any existing contracts; and (5) retain trust account monies under the control of the administrator, executor or co-signer on the account until all parties to each transaction agree in writing to disposition or until a

court of competent jurisdiction issues an order relative to disposition.

#### **R162-4-2. Trust Accounts.**

4.2 All monies received in a real estate transaction regulated under Section 61-2-1, et seq., must be deposited in a separate non-interest bearing "Real Estate Trust Account," or, if the broker and the parties to the transaction agree in writing, into an "Interest Bearing Real Estate Trust Account," in a Utah bank, credit union, or other approved escrow depository in this state. The principal broker will be held personally responsible for deposits at all times. The principal broker must notify the Division in writing of the location and account numbers of all real estate trust accounts which he maintains. The "Real Estate Trust Account" and the "Interest Bearing Real Estate Trust Account" shall be used exclusively for real estate transactions regulated under Section 61-2-1, et seq. Funds received in connection with rental of tourist accommodations for any period of less than 30 consecutive days shall not be deposited in the "Real Estate Trust Account" or the "Interest Bearing Real Estate Trust Account."

4.2.1. Deposits. All monies received by a licensee in a real estate transaction, whether it be cash or check, must be delivered to the principal broker and deposited within three banking days after receipt of the funds by the licensee. This rule does not apply when:

4.2.1.1. The Real Estate Purchase Contract or other agreement states that the earnest money or other funds are to be held for a specific length of time or are to be deposited upon acceptance by the seller; or

4.2.1.2. The Real Estate Purchase Contract or other agreement states that the earnest money or other funds are to be made out and paid to the seller, or to the person or company named as the escrow closing agent; or

4.2.1.3. A promissory note is given as the earnest money deposit or otherwise credited to the transaction. The promissory note must name the seller as payee and be retained in the principal broker's file until closing. If a promissory note is used in a real estate transaction, the Real Estate Purchase Contract or other agreement must disclose that the consideration is in the form of a promissory note.

4.2.2. Commingling. Not more than \$100 of the principal broker's own funds can remain in the "Real Estate Trust Account" or the "Property Management Trust Account," or the Division will consider the account to be commingled.

4.2.3. Builder Deposits. If a principal broker, who is also a builder or developer, receives deposit money under a Real Estate Purchase Contract, construction contract, or other agreement which provides for the construction of a dwelling, the deposit money must be placed in the "Real Estate Trust Account" or if the broker and the parties to the transaction agree in writing, the "Interest Bearing Real Estate Trust Account" and not be used for construction purposes unless specifically provided in the document or by separate written consent of the purchaser.

4.2.4. Interest Bearing Account. If an earnest money deposit is received and the parties believe that it would be uneconomical to place the money on demand in the "Real Estate Trust Account," or the parties want interest earned on the deposit to be used for an affordable housing program, such as the Utah Association of REALTORS Housing Opportunity Fund (UARHOF), the principal broker may, upon the written request of the parties, place the money in a

separate "Interest Bearing Real Estate Trust Account." The written request must designate to whom the interest will be paid upon completion or failure of the sale.

4.2.5. Liability for Receipt. All consideration represented as received by a licensee on a Real Estate Purchase Contract or other document must have, in fact, been received by the licensee. A licensee must not rely on a buyer's or a lessee's promise to deliver the consideration at a future date.

4.2.6. Property Management Trust Account. Each principal broker engaged in property management shall establish a separate "Property Management Trust Account." A principal broker who collects rents for others only occasionally or who does so as a convenience for his clients, and manages no more than six accounts, may use the "Real Estate Trust Account" for this purpose and need not maintain a "Property Management Trust Account".

4.2.7. Disbursements. All cash and like payments in lieu of cash received by a principal broker in a real estate transaction are to be disbursed only in accordance with the terms of the Real Estate Purchase Contract which authorizes such disbursement, other proper written authorization of the parties having an interest in the payments, or by court order.

4.2.7.1. The withdrawal of any portion of the principal broker's sales commission must not take place without written authorization from the seller and buyer or until the closing statements have been delivered to the buyer and seller and the buyer or seller has been paid for the amount due as determined by the closing statement.

4.2.7.2. Commissions due the principal broker, other licensees associated with the principal broker, or other principal brokers may be paid directly from the trust account only after the transaction is closed or otherwise terminated. If commissions are so disbursed, a record of each disbursement is to be recorded on the trust account ledger sheet for the transaction.

4.2.7.3. When it becomes apparent to the principal broker that a transaction has failed, or if a party to the failed transaction requests disbursement of the earnest money or other trust funds, those funds may only be disbursed by the principal broker as provided in R162-4.2.7 above.

4.2.7.4. In the event a dispute arises over the return or forfeiture of the earnest money or other trust funds, and no party has filed a civil suit arising out of the transaction, the principal broker shall, within 15 days of notice of the dispute, provide the parties written notice of the dispute and request them to meet to mediate the matter. If the parties have contractually agreed to submit disputes arising out of their contract to mediation, the principal broker shall notify the parties of their obligation to submit the dispute over funds to an independent mediator agreed upon by the parties. If the parties have not contractually agreed to independent mediation, the principal broker holding the earnest money or trust funds shall use good faith best efforts to mediate.

4.2.7.4.1. In the event the dispute is not resolved in either a broker or independent mediation attempt, the principal broker shall maintain the disputed funds in a non-interest bearing real estate trust account. If the parties authorize, or if they previously authorized, deposit into a separate interest bearing trust account as provided in R162-4.2.4, the disputed funds may be maintained in a separate interest bearing trust account for disputed funds. The funds shall only be

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disbursed by the principal broker: (1) upon written authorization of the parties who will not receive the funds; (2) pursuant to the order of a court of competent jurisdiction; or (3) as provided in Section 4.2.7.4.2.

4.2.7.4.2. If the principal broker has not received written notice of a claim to the funds, including interest if any, within five years after the failure of the transaction, the principal broker may remit the funds to the State Treasurer's Office as "abandoned" property according to the provisions of Utah Code Section 67-4a-101, et seq.

4.2.8. Records. A principal broker must maintain at his principal business location a complete record of all consideration received or escrowed for real estate transactions in the following manner:

4.2.8.1. A duplicate deposit slip must show the amount of money received, the transaction number, and the date and place of deposit.

4.2.8.2. A set of checks and deposit slips must be used denoting the principal broker's business name and address, stating "Real Estate Trust Account" or "Property Management Trust Account," with the checks numbered consecutively. Checks drawn on this account are to be identified to the specific transaction. Deposits to this account are to be identified to the specific transaction. Voided trust checks are to be marked "Void" and the original check retained in the principal broker's file. A principal broker may establish as many bank trust accounts as desired. However, each trust account must be identified with the type of activity for which the account is to be used and the Division must be notified in writing when each account is established.

4.2.8.3. A check register or check stubs must be maintained which itemize deposits and disbursements in consecutive order showing the date, payee or payor, the transaction information, check number, amount of disbursement or deposit, and the current balance remaining in the account.

4.2.8.4. An individual trust ledger sheet must be established upon deposit of any consideration and assigned a sequential transaction number for each transaction—be it rental, sale, or other. The ledger sheet must show the names of the parties, location of the property, the date and amount of each deposit or disbursement, the name of the payee and payor, the current balance remaining, and any other relevant transaction information. Each ledger sheet, after the transaction is closed, must show the final disposition of the consideration and be retained in the principal broker's file for a minimum of three years following the year in which the transaction was closed.

4.2.8.5. The trust account is to be reconciled with the bank statement at least monthly. The trust liability, which is the total of ledger cards, and similar books, records, and accounts must be kept up to date.

#### **R162-4-3. Branch Office.**

4.3. A branch office must be registered with the Division prior to operation.

4.3.1. Exemptions. A branch office does not include a model home, a project sales office, or a facility established for twelve months or less as a temporary site for marketing activity, such as an exhibit booth.

4.3.2. Operation. A branch office must operate under the same business name as the principal brokerage.

4.3.3. Trust Account. The principal broker or branch broker must notify the Division in writing of the location and account number of all real estate trust

accounts in which the funds received at each branch office will be deposited.

4.3.4. Branch Broker. Each branch office must have a branch broker who will actively manage the office. The branch broker must be an associate broker. The principal broker must actively supervise the branch broker.

4.3.5. Registration. To register a branch office, the principal broker must submit to the Division, on the forms required by the Division, the location of the branch, the name of the branch broker and the names of all associate brokers and sales agents assigned to the branch, accompanied by the applicable fee.

4.3.6. Change of Branch Broker. The principal broker must notify the Division in writing on the forms required by the Division at the time of a change of branch broker.

#### **References: 61-2-5.5.**

**History:** 9149, PRO, 01/01/88; 10292, AMD, 01/02/90; 15500, AMD, 03/03/94; 16759, AMD, 04/14/95; 19595, 5YR, 07/01/97; 19588, AMD, see CPR; 19588, CPR, 10/03/97; 20801, AMD, 04/23/98.

### **R162-5. Property Management.**

R162-5-1. Definition.

R162-5-2. Exemptions.

R162-5-3. Property Management by Real Estate Brokerage.

R162-5-4. Property Management by Separate Property Management Company.

#### **R162-5-1. Definition.**

5.1. For purposes of this rule, property management requiring a real estate license includes advertising real estate for lease or rent, procuring prospective tenants or lessees, negotiating lease or rental terms, executing lease or rental agreements, collecting rent and accounting for and disbursing the money collected, arranging for repairs to be made to the real estate, and all other acts listed in Section 61-2-2(9)(c). It does not include the leasing or management of surface or subsurface minerals, or oil and gas interests, which is separate from a sale or lease of the surface estate.

#### **R162-5-2. Exemptions.**

5.2. The following individuals are not required to hold active real estate licenses to engage in property management:

5.2.1. Owners. An owner of real estate who manages his own property;

5.2.2. Employees. A regular salaried employee of an owner of real estate who manages property owned by his employer,

5.2.3. Apartment Managers. An individual who manages the apartments at which he resides in exchange for free or reduced rent on his apartment.

5.2.4. Homeowner's Association Employees. A full time salaried employee of a homeowner's association who manages units subject to the declaration of condominium which established the homeowner's association.

#### **R162-5-3. Property Management by Real Estate Brokerage.**

5.3. All property management performed by a real estate brokerage which has not obtained a separate property management company registration, or any

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licensees or unlicensed assistants affiliated with the brokerage, shall be done under the name of the brokerage and not under a separate business name.

5.3.1. All property management activities by a sales agent or associate broker affiliated with a principal broker shall be actively supervised by that principal broker. In the case of a branch office, the branch broker shall also actively supervise the licensees and unlicensed assistants affiliated with that branch.

#### **R162-5-4. Property Management by Separate Property Management Company.**

5.4. A separate property management company registration must be obtained in order to conduct property management business under a name different than that of the real estate brokerage.

5.4.1. The business of a separate property management company shall be exclusively property management. No real estate sales activity may be conducted by a property management company.

5.4.2. A license to operate a property management company will be granted upon compliance with the following conditions:

5.4.2.1. Application. Submission of the property management company application form required by the division, signed by an actively licensed principal broker, together with the proper application fees.

5.4.2.2. Business Name Approval. Compliance with the name approval provisions in R162-2.3. in the case of a principal broker who registers the name of his property management company with the division or R162-2.4. in the case of a property management company registration issued to a corporation, partnership, Limited Liability Company or association.

5.4.2.3. Property management by unlicensed principals or owners prohibited. Individuals who are principals or owners of a corporation, partnership, Limited Liability Company or association which is issued a property management company registration shall not engage in activity which requires a license unless they are licensed with the division and properly affiliated with the management broker for the corporation, partnership, Limited Liability Company or association.

5.4.3. The principal broker shall sign and submit the forms required by the division to affiliate with the property management company of each associate broker, branch broker and sales agent who will conduct property management services for the property management company.

5.4.4. Support Services Personnel. Individuals who are employees of a property management company may perform the following services under the supervision of the principal broker without holding active real estate licenses: providing a prospective tenant with access to a vacant apartment; providing secretarial, bookkeeping, maintenance, or rent collection services; quoting predetermined rent and lease terms; and filling out pre-printed lease or rental agreements.

5.4.5. Supervision. All property management activities by an associate broker or sales agent affiliated with the management company and all activities on behalf of the company by support services personnel shall be actively supervised by the principal broker of the company. In the case of a branch office, the branch broker shall also actively supervise the licensees and support services personnel affiliated with that branch.

#### **References: 61-2-5.**

**History:** 10293, AMD, 01/02/90, 10378, NSC, 12/18/89; 12725, AMD, 06/24/92; 13051, AMD,

09/14/92; 15501, NSC, 03/01/94; 19596, 5YR, 07/01/97; 20802, AMD, 04/23/98.

#### **R162-6. Licensee Conduct.**

R162-6-1. Improper Practices.

R162-6-2. Standards of Practice.

##### **R162-6-1. Improper Practices.**

6.1.1. False devices. A licensee shall not propose, prepare, or cause to be prepared any document, agreement, closing statement, or any other device or scheme, which does not reflect the true terms of the transaction, nor shall a licensee knowingly participate in any transaction in which a similar device is used.

6.1.1.1. Loan Fraud. A licensee shall not participate in a transaction in which a buyer enters into any agreement that is not disclosed to the lender, which, if disclosed, may have a material effect on the terms or the granting of the loan.

6.1.1.2. Double Contracts. A licensee shall not use or propose the use of two or more purchase agreements, one of which is not made known to the prospective lender or loan guarantor.

6.1.2. Signs. It is prohibited for any licensee to have a sign on real property without the written consent of the property owner.

6.1.3. Licensee's Interest in a Transaction. A licensee shall not buy, sell, or lease or rent any real property as a principal, either directly or indirectly, without first disclosing in writing on the purchase agreement or the lease or rental agreement his true position as principal in the transaction. A licensee will be considered to be a principal for the purposes of this rule if he is an owner, officer, director, partner, member, or employee of an entity which is a principal in the transaction. In the case of a licensee who is a stockholder but who is not an officer, director or employee of a corporation which is a principal in the transaction, the licensee will be considered to be a principal for the purposes of this rule if he owns more than 10% of the stock of the corporation.

6.1.4. Listing Content. The real estate licensee completing a listing agreement is responsible to make reasonable efforts to verify the accuracy and content of the listing.

6.1.4.1. Net listings are prohibited and shall not be taken by a licensee.

6.1.5. Advertising. This rule applies to all advertising materials, including newspaper, magazine, Internet, e-mail, radio, and television advertising, direct mail promotions, business cards, door hangers, and signs.

6.1.5.1. Any advertising by active licensees that does not include the name of the real estate brokerage as shown on Division records is prohibited except as otherwise stated herein.

6.1.5.2 If the licensee advertises property in which he has an ownership interest and the property is not listed, the ad need not appear over the name of the real estate brokerage if the ad includes the phrase "owner-agent" or the phrase "owner-broker".

6.1.5.3. Names of individual licensees may be advertised in addition to the brokerage name. If the names of individual licensees are included in advertising, the brokerage must be identified in a clear and conspicuous manner. This requirement may be satisfied by identifying the brokerage in lettering which is at least one-half the size of the lettering which identifies the individual licensees.

6.1.5.4. Advertising teams, groups, or other marketing entities which are not licensed as brokerages is prohibited if the advertising states "owner-agent" or "owner-broker" instead of the brokerage name.

6.1.5.5. Advertising teams, groups, or other marketing entities which are not licensed as brokerages is permissible in advertising which includes the brokerage name upon the following conditions:

(a) The brokerage must be identified in a clear and conspicuous manner. This requirement may be satisfied by identifying the brokerage in lettering which is at least one-half the size of the lettering which identifies the team, group, or other marketing entity; and

(b) The advertising shall clearly indicate that the team, group, or other marketing entity is not itself a brokerage and that all licensees involved in the entity are affiliated with the brokerage named in the advertising.

6.1.5.6. If any photographs of personnel are used, the actual roles of any individuals who are not licensees must be identified in terms which make it clear that they are not licensees.

6.1.5.7. Any artwork or text which states or implies that licensees have a position or status other than that of sales agent or associate broker affiliated with a brokerage is prohibited.

6.1.5.8. Under no circumstances may a licensee advertise or offer to sell or lease property without the written consent of the owner of the property or the listing broker. Under no circumstances may a licensee advertise or offer to sell or lease property at a lower price than that listed without the written consent of the seller or lessor.

6.1.5.9. If an active licensee advertises to purchase or rent property, all advertising must contain the name of the licensee's real estate brokerage as shown on Division records.

6.1.6. Double Commissions. In order to avoid subjecting the seller to paying double commissions, licensees must not sell listed properties other than through the listing broker. A licensee shall not subject a principal to paying a double commission without the principal's informed consent.

6.1.6.1. A licensee shall not enter or attempt to enter into a concurrent agency representation agreement with a buyer or a seller, a lessor or a lessee, when the licensee knows or should know of an existing agency representation agreement with another licensee.

6.1.7. Retention of Buyer's Deposit. A principal broker holding an earnest money deposit shall not be entitled to any of the deposit without the written consent of the buyer and the seller.

6.1.8. Unprofessional conduct. No licensee shall engage in any of the practices described in Section 61-2-2, et seq., whether acting as agent or on his own account, in a manner which fails to conform with accepted standards of the real estate sales, leasing or management industries and which could jeopardize the public health, safety, or welfare and includes the violation of any provision of Section 61-2-2, et seq. or the rules of this chapter.

6.1.9. Finder's Fees. A licensee may not pay a finder's fee or give any valuable consideration to an unlicensed person or entity for referring a prospect in a real estate transaction, except as provided in this rule.

6.1.9.1. Token gifts. A licensee may give a gift valued at \$50 or less to an individual in appreciation for an unsolicited referral of a prospect which resulted in a real estate transaction.

6.1.10. Referral fees from lenders. A licensee may not receive a referral fee from a lender.

6.1.11. Failure to have written agency agreement. To avoid representing more than one party without the informed consent of all parties, principal brokers and licensees acting on their behalf shall have written agency agreements with their principals. The failure to define an agency relationship in writing will be considered unprofessional conduct and grounds for disciplinary action by the Division.

6.1.11.1. A principal broker and licensees acting on his behalf who represent a seller shall have a written agency agreement with the seller defining the scope of the agency.

6.1.11.2. A principal broker and licensees acting on his behalf who represent a buyer shall have a written buyer agency agreement with the buyer defining the scope of the agency.

6.1.11.3. A principal broker and licensees acting on his behalf who represent both buyer and seller shall have written agency agreements with both buyer and seller which define the scope of the limited agency and which demonstrate that the principal broker has obtained the informed consent of both buyer and seller to the limited agency as set forth in Section R162-6.2.16.3.1.

6.1.11.4. A licensee affiliated with a brokerage other than the listing brokerage who wishes to act as a sub-agent for the seller, shall, prior to showing the seller's property:

(a) obtain permission from the principal broker with whom he is affiliated to act as a sub-agent,

(b) notify the listing brokerage that sub-agency is requested;

(c) enter into a written agreement with the listing brokerage consenting to the sub-agency and defining the scope of the agency; and

(d) obtain from the listing brokerage all information about the property which the listing brokerage has obtained.

6.1.11.5. A principal broker and licensees acting on his behalf who act as a property manager shall have a written property management agreement with the owner of the property defining the scope of the agency.

6.1.11.6. A principal broker and licensees acting on his behalf who represent a tenant shall have a written agreement with the tenant defining the scope of the agency.

## **R162-6-2. Standards of Practice.**

6.2.1. Approved Forms. The following standard forms are approved by the Utah Real Estate Commission and the Office of the Attorney General for use by all licensees:

(a) September 30, 1999, Real Estate Purchase Contract (mandated use of this form is July 1, 2000);

(b) January 1, 1999 Real Estate Purchase Contract for Residential Construction;

(c) January 1, 1987, Uniform Real Estate Contract;

(d) October 1, 1983, All Inclusive Trust Deed;

(e) October 1, 1983, All Inclusive Promissory Note Secured by All Inclusive Trust Deed;

(f) January 1, 1999, Addendum/Counteroffer to Real Estate Purchase Contract;

(g) January 1, 1999, Seller Financing Addendum to Real Estate Purchase Contract;

(h) January 1, 1999, Survey Addendum to Real Estate Purchase Contract;

(i) January 1, 1999, Buyer Financial Information Sheet;

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(j) January 1, 1999, FHA/VA Loan Addendum to Real Estate Purchase Contract;

(k) January 1, 1999, Assumption Addendum to Real Estate Purchase Contract;

(l) January 1, 1999, Lead-based Paint Addendum to Real Estate Purchase Contract;

(m) January 1, 1999, Disclosure and Acknowledgment Regarding Lead-based Paint and/or Lead-based Paint Hazards.

6.2.1.1. Forms Required for Closing. Principal brokers and associate brokers may fill out forms in addition to the standard state-approved forms if the additional forms are necessary to close a transaction. Examples include closing statements, and warranty or quit claim deeds.

6.2.1.2. Forms Prepared by an Attorney. Any licensee may fill out forms prepared by the attorney for the buyer or lessee or the attorney for the seller or lessor to be used in place of any form listed in R162-6.2.1 (a) through (g) if the buyer or lessee or the seller or lessor requests that other forms be used and the licensee verifies that the forms have in fact been drafted by the attorney for the buyer or lessee, or the attorney for the seller or lessor.

6.2.1.3. Additional Forms. If it is necessary for a licensee to use a form for which there is no state-approved form, for example, the licensee may fill in the blanks on any form which has been prepared by an attorney, regardless of whether the attorney was employed for the purpose by the buyer, seller, lessor, lessee, brokerage, or an entity whose business enterprise is selling blank legal forms.

6.2.1.4. Standard Supplementary Clauses. There are Standard Supplementary Clauses approved by the Utah Real Estate Commission which may be added to Real Estate Purchase Contracts by all licensees. The use of the Standard Supplementary Clauses will not be considered the unauthorized practice of law.

6.2.2. Copies of Agreement. After a purchase agreement is properly signed by both the buyer and seller, it is the responsibility of each participating licensee to cause copies thereof, bearing all signatures, to be delivered or mailed to the buyer and seller with whom the licensee is dealing. The licensee preparing the document shall not have the parties sign for a final copy of the document prior to all parties signing the contract evidencing agreement to the terms thereof. After a lease is properly signed by both landlord and tenant, it is the responsibility of the principal broker to cause copies of the lease to be delivered or mailed to the landlord or tenant with whom the brokerage or property management company is dealing.

6.2.3. Residential Construction Agreement. The Earnest Money Sales Agreement for Residential Construction must be used for all transactions for the construction of dwellings to be built or presently under construction for which a Certificate of Occupancy has not been issued.

6.2.4. Employee Licensee. A real estate licensee working as a regular salaried employee as defined in section 1 of these rules, who sells real estate owned by the employer or leases real estate owned by the employer, may only do so and may only be compensated directly by the employer under one of the following conditions: (1) the licensee is a principal broker; (2) the employer has on its staff a principal broker with whom the licensee affiliates for sales or management transactions; or (3) the employer contracts with a principal broker so that all employed

licensees are affiliated with and supervised by a principal broker.

6.2.5. Real Estate Auctions. A principal broker who contracts or in any manner affiliates with an auctioneer or auction company which is not licensed under the provisions of Section 61-2-1 et seq. for the purpose of enabling that auctioneer or auction company to auction real property in this state, shall be responsible to assure that all aspects of the auction comply with the requirements of this section and all other laws otherwise applicable to real estate licensees in real estate transactions. Auctioneers and auction companies who are not licensed under the provisions of Section 61-2-1 et seq. may conduct auctions of real property located within this state upon the following conditions:

6.2.5.1. Advertising. All advertising and promotional materials associated with an auction must conspicuously disclose that the auction is conducted under the supervision of a named principal broker licensed in this state; and

6.2.5.2. Supervision. The auction must be conducted under the supervision of a principal broker licensed in this state who must be present at the auction; and

6.2.5.3. Use of Approved Forms. Any purchase agreements used at the auction must meet the requirements of Section 61-2-20 and must be filled out by a Utah real estate licensee; and

6.2.5.4. Placement of Deposits. All monies deposited at the auction must be placed either in the real estate trust account of the principal broker who is supervising the auction or in an escrow depository agreed to in writing by the parties to the transaction.

6.2.5.5. Closing Arrangements. The principal broker supervising the auction shall be responsible to assure that adequate arrangements are made for the closing of each real estate transaction arising out of the auction.

6.2.6. Guaranteed Sales. As used herein, the term "guaranteed sales plan" includes: (a) any plan in which a seller's real estate is guaranteed to be sold or; (b) any plan whereby a licensee or anyone affiliated with a licensee will purchase a seller's real estate if it is not purchased by a third party in the specified period of a listing or within some other specified period of time.

6.2.6.1. In any real estate transaction involving a guaranteed sales plan, the licensee shall provide full disclosure as provided herein regarding the guarantee:

(a) Written Advertising. Any written advertisement by a licensee of a "guaranteed sales plan" shall include a statement advising the seller that if the seller is eligible, costs and conditions may apply and advising the seller to inquire of the licensee as to the terms of the guaranteed sales agreement. This information shall be set forth in print at least one-fourth as large as the largest print in the advertisement.

(b) Radio/Television Advertising. Any radio or television advertisement by a licensee of a "guaranteed sales plan" shall include a conspicuous statement advising if any conditions and limitations apply.

(c) Guaranteed Sales Agreements. Every guaranteed sales agreement must be in writing and contain all of the conditions and other terms under which the property is guaranteed to be sold or purchased, including the charges or other costs for the service or plan, the price for which the property will be sold or purchased and the approximate net proceeds the seller may reasonably expect to receive.

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6.2.7. Agency Disclosure. In every real estate transaction involving a licensee, as agent or principal, the licensee shall clearly disclose in writing to his respective client(s) or any unrepresented parties, his agency relationship(s). The disclosure shall be made prior to the parties entering into a binding agreement with each other. The disclosure shall become part of the permanent file.

6.2.7.1. When a binding agreement is signed in a sales transaction, the prior agency disclosure shall be confirmed in the currently approved Real Estate Purchase Contract or, with substantially similar language, in a separate provision incorporated in or attached to that binding agreement.

6.2.7.2. When a lease or rental agreement is signed, a separate provision shall be incorporated in or attached to it confirming the prior agency disclosure. The agency disclosure shall be in the form stated in R162-6.2.7.1, but shall substitute terms applicable for a rental transaction for the terms "buyer", "seller", "listing agent", and "selling agent".

6.2.7.3. Disclosure to other agents. An agent who has established an agency relationship with a principal shall disclose who he or she represents to another agent upon initial contact with the other agent.

6.2.8. Duty to Inform. Sales agents and associate brokers must keep their principal broker or branch broker informed on a timely basis of all real estate transactions in which the licensee is involved, as agent or principal, in which the licensee has received funds on behalf of the principal broker or in which an offer has been written.

6.2.9. Broker Supervision. Principal brokers and associate brokers who are branch brokers shall be responsible for exercising active supervision over the conduct of all licensees affiliated with them.

6.2.9.1. A broker will not be held responsible for inadequate supervision if:

(a) An affiliated licensee violates a provision of Section 61-2-1, et seq., or the rules promulgated thereunder, in contravention of the supervising broker's specific written policies or instructions; and

(b) Reasonable procedures were established by the broker to ensure that licensees receive adequate supervision and the broker has followed those procedures; and

(c) Upon learning of the violation, the broker attempted to prevent or mitigate the damage; and

(d) The broker did not participate in the violation; and

(e) The broker did not ratify the violation; and

(f) The broker did not attempt to avoid learning of the violation.

6.2.9.2. The existence of an independent contractor relationship or any other special compensation arrangement between the broker and affiliated licensees shall not release the broker and licensees of any duties, obligations, or responsibilities.

6.2.10. Disclosure of Fees. If a real estate licensee who is acting as an agent in a transaction will receive any type of fee in connection with a real estate transaction in addition to a real estate commission, that fee must be disclosed in writing to all parties to the transaction.

6.2.11. Fees from Builders. All fees paid to a licensee for referral of prospects to builders must be paid to the licensee by the principal broker with whom he is licensed and affiliated. All fees must be disclosed as required by R162-6.2.10.

6.2.12. Fees from Manufactured Housing Dealers. If a licensee refers a prospect to a manufactured home

dealer or a mobile home dealer, under terms as defined in Section 58-56-1, et seq., any fee paid for the referral of a prospect must be paid to him by the principal broker with whom he is licensed.

6.2.13. Gifts and Inducements. A gift given by a principal broker to a buyer or seller, lessor or lessee, in a real estate transaction as an inducement to use the services of a real estate brokerage, or in appreciation for having used the services of a brokerage, is permissible and is not an illegal sharing of commission. If an inducement is to be offered to a buyer or seller, lessor or lessee, who will not be obligated to pay a real estate commission in a transaction, the principal broker must obtain from the party who will pay the commission written consent that the inducement be offered.

6.2.14. "Due-On-Sale" Clauses. Real estate licensees have an affirmative duty to disclose in writing to buyers and sellers the existence or possible existence of a "due-on-sale" clause in an underlying encumbrance on real property, and the potential consequences of selling or purchasing a property without obtaining the authorization of the holder of the underlying encumbrance.

6.2.15. Personal Assistants. With the permission of the principal broker with whom the licensee is affiliated, the licensee may employ an unlicensed individual to provide services in connection with real estate transactions which do not require a real estate license, including the following examples:

(a) Clerical duties, including making appointments for prospects to meet with real estate licensees, but only if the contact has been initiated by the prospect and not by the unlicensed person;

(b) At an open house, distributing preprinted literature written by a licensee, so long as a licensee is present and the unlicensed person furnishes no additional information concerning the property or financing and does not become involved in negotiating, offering, selling or filling in contracts;

(c) Acting only as a courier service in delivering documents, picking up keys, or similar services, so long as the courier does not engage in any discussion of, or filling in of, the documents;

(d) Placing brokerage signs on listed properties;

(e) Having keys made for listed properties; and

(f) Securing public records from the County Records' Offices, zoning offices, sewer districts, water districts, or similar entities.

6.2.15.1. If personal assistants are compensated for their work, they shall be compensated at a predetermined rate which is not contingent upon the occurrence of real estate transactions. Licensees may not share commissions with unlicensed persons who have assisted in transactions by performing the services listed in this rule.

6.2.15.2. The licensee who hires the unlicensed person will be responsible for supervising the unlicensed person's activities, and shall ensure that the unlicensed person does not perform activity which requires a real estate license.

6.2.15.3. Unlicensed individuals may not engage in telephone solicitation or other activity calculated to result in securing prospects for real estate transactions, except as provided in R162-6.2.15.(a) above.

6.2.16. Fiduciary Duties. A principal broker and licensees acting on his behalf owe the following fiduciary duties to the principal:

6.2.16.1. Duties of a seller's or lessor's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the seller or the lessor owe the seller or the lessor the following fiduciary duties:

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(a) Loyalty, which obligates the agent to act in the best interest of the seller or the lessor instead of all other interests, including the agent's own;

(b) Obedience, which obligates the agent to obey all lawful instructions from the seller or lessor;

(c) Full disclosure, which obligates the agent to tell the seller or lessor all material information which the agent learns about the buyer or lessee or about the transaction;

(d) Confidentiality, which prohibits the agent from disclosing any information given to the agent by the seller or lessor which would likely weaken the seller's or lessor's bargaining position if it were known, unless the agent has permission from the seller or lessor to disclose the information. This duty does not require the agent to withhold any known material fact concerning a defect in the property or the seller's or lessor's ability to perform his obligations;

(e) Reasonable care and diligence;

(f) Holding safe and accounting for all money or property entrusted to the agent; and

(g) Any additional duties created by the agency agreement.

6.2.16.2. Duties of a buyer's or lessee's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the buyer or lessee owe the buyer or lessee the following fiduciary duties:

(a) Loyalty, which obligates the agent to act in the best interest of the buyer or lessee instead of all other interests, including the agent's own;

(b) Obedience, which obligates the agent to obey all lawful instructions from the buyer or lessee;

(c) Full Disclosure, which obligates the agent to tell the buyer or lessee all material information which the agent learns about the property or the seller's or lessor's ability to perform his obligations;

(d) Confidentiality, which prohibits the agent from disclosing any information given to the agent by the buyer or lessee which would likely weaken the buyer's or lessee's bargaining position if it were known, unless the agent has permission from the buyer or lessee to disclose the information. This duty does not permit the agent to misrepresent, either affirmatively or by omission, the buyer's or lessee's financial condition or ability to perform;

(e) Reasonable care and diligence;

(f) Holding safe and accounting for all money or property entrusted to the agent; and

(g) Any additional duties created by the agency agreement.

6.2.16.3. Duties of a limited agent. A principal broker and licensees acting on his behalf who act as agent for both seller and buyer, or lessor and lessee, commonly referred to as "dual agents," are limited agents since the fiduciary duties owed to seller and to buyer, or to lessor and lessee, are inherently contradictory. A principal broker and licensees acting on his behalf may act in this limited agency capacity only if the informed consent of both buyer and seller, or lessor and lessee, is obtained.

6.2.16.3.1. In order to obtain informed consent, the principal broker or a licensee acting on his behalf shall clearly explain to both buyer and seller, or lessor and lessee, that they are each entitled to be represented by their own agent if they so choose, and shall obtain written agreement from both parties that they will each be giving up performance by the agent of the following fiduciary duties:

(a) The principal broker or a licensee acting on his behalf shall explain to buyer and seller, or lessor and lessee, that they are giving up their right to demand

undivided loyalty from the agent, although the agent, acting in this neutral capacity, shall advance the interest of each party so long as it does not conflict with the interest of the other party. In the event of conflicting interests, the agent will be held to the standard of neutrality; and

(b) The principal broker or a licensee acting on his behalf shall explain to buyer and seller, or lessor and lessee, that there will be a conflict as to a limited agent's duties of confidentiality and full disclosure, and shall explain what kinds of information will be held confidential if told to a limited agent by either buyer or seller, or lessor and lessee, and what kinds of information will be disclosed if told to the limited agent by either party. The limited agent may not disclose any information given to the agent by either principal which would likely weaken that party's bargaining position if it were known, unless the agent has permission from the principal to disclose the information; and

(c) The principal broker or a licensee acting on his behalf shall explain to the buyer and seller, or lessor and lessee, that the limited agent will be required to disclose information given to the agent in confidence by one of the parties if failure to disclose the information would be a material misrepresentation regarding the property or regarding the abilities of the parties to fulfill their obligations.

(d) The Division and the Commission shall consider use of consent language approved by the Division and the Commission to be informed consent.

6.2.16.3.2. In addition, a limited agent owes the following fiduciary duties to all parties:

(a) Obedience, which obligates the limited agent to obey all lawful instructions from either the buyer or the seller, lessor and lessee, consistent with the agent's duty of neutrality;

(b) Reasonable care and diligence;

(c) Holding safe all money or property entrusted to the limited agent; and

(d) Any additional duties created by the agency agreement

6.2.16.4. Duties of a sub-agent. A principal broker and licensees acting on his behalf who act as sub-agents owe the same fiduciary duty to a principal as the brokerage retained by the principal.

#### References: 61-2-5.5.

History: 10294, AMD, 01/02/90; 11984, AMD, 10/18/91; 12470, AMD, 03/16/92; 12693, AMD, 06/24/92; 13052, AMD, 09/14/92; 14974, AMD, 11/15/93; 15502, NSC, 03/01/94; 17173, AMD, see CPR; 17173, CPR, 01/25/96; 17711, AMD, 06/04/96; 18099, AMD, see CPR; 18099, CPR, 01/01/97; 19597, 5YR, 07/01/97; 20803, AMD, 04/23/98; 21968, AMD, 06/03/99; 22514, AMD, 01/27/2000.

#### NOTES TO DECISIONS

##### ANALYSIS

Improper practices.

—Damage.

Cited.

Improper practices.

—Damage.

It is not necessary to find damage in order to find a licensed real estate broker "unworthy or incompetent," because of the public interest in assuring that

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real estate brokers are honest, ethical, and competent. (Former R174-1 and predecessor rules.) In re License of Topik, 761 P.2d 32 (Utah Ct. App. 1988).

#### **Cited.**

For cases citing this rule or similar former rules, see Wardley Corp. v. Welsh, 962 P.2d 86 (Utah Ct. App. 1998).

### **R162-7. Enforcement.**

R162-7-1. Filing of Complaint.

R162-7-2. Notice of Complaint.

R162-7-3. Investigation and Enforcement.

R162-7-4. Corrective Notice.

#### **R162-7-1. Filing of Complaint.**

7.1. An aggrieved person may file a complaint in writing against a licensee; or the Division or the Commission may initiate a complaint upon its own motion for alleged violation of the provisions of these rules or of Section 61-2-1, et seq. The Division will not entertain complaints between licensees regarding claims to commissions.

#### **R162-7-2. Notice of Complaint.**

7.2. When the Division notifies a licensee of a complaint against him the licensee must respond to the complaint within ten business days after receipt of the notice from the Division. Failure to respond to the notice of complaint or any subsequent requests for information from the Division within the required time period will be considered an additional violation of these rules and separate grounds for disciplinary action against the licensee.

#### **R162-7-3. Investigation and Enforcement.**

7.3. The investigative and enforcement activities of the Division shall include the following: investigation of information provided on new license applications; evaluation and investigation of complaints; auditing licensees' business records, including trust account records; meeting with complainants, respondents, witnesses and attorneys; making recommendations for dismissal or prosecution; preparation of cases for formal or informal hearings, restraining orders or injunctions; working with the assistant attorney general and representatives of other state and federal agencies; and entering into proposed stipulations for presentation to the Commission and the director.

#### **R162-7-4. Corrective Notice.**

7.4. In addition to disciplinary action under Section 61-2-11, the Division may give a licensee written notice of specific violations of these rules and may grant a licensee a reasonable period of time, not exceeding 30 days, to correct a defect in that licensee's practices or operations. The licensee's failure to correct the defect within the time granted shall constitute separate grounds for disciplinary action against the licensee. The Division is not required to give a corrective notice and allow an opportunity to correct a defect before it may commence disciplinary action against a licensee.

#### **References:** 61-2-5.5.

**History:** 9152, PRO, 01/01/88; 11985, AMD, 09/03/91; 15503, NSC, 03/01/94; 19598, 5YR, 07/01/97; 19591, AMD, 11/01/97; 20804, AMD, 04/23/98.

### **NOTES TO DECISIONS**

#### **Statute of limitations.**

In the absence of specific legislative authority, civil statutes of limitations are inapplicable to administrative disciplinary proceedings since an administrative disciplinary hearing is not a civil proceeding. They are likewise not subject to the limitation of UCA § 78-12-33, regarding commencement of actions by the state. Rogers v. Division of Real Estate, 790 P.2d 102 (Utah Ct. App. 1990).

**Explained,** 809 FS 880.

### **R162-8. Prelicensing Education.**

R162-8-1. Definitions.

R162-8-2. Determining Fitness for School Certification.

R162-8-3. School Application for Certification.

R162-8-4. School Certification.

R162-8-5. Determining Fitness for Instructor Certification.

R162-8-6. Instructor Application for Certification.

R162-8-7. Instructor Certification Renewal.

R162-8-8. Administrative Proceedings.

#### **R162-8-1. Definitions.**

8.1.1 For the purposes of this rule, "school" includes:

8.1.1.1 Any college or university accredited by a regional accrediting agency which is recognized by the United States Department of Education;

8.1.1.2 Any community college, vocational-technical school, state or federal agency or commission;

8.1.1.3 Any nationally recognized real estate organization, any Utah real estate organization, or any local real estate organization which has been approved by the Real Estate Commission;

8.1.1.4 Any proprietary real estate school.

8.1.2 For the purposes of this rule, "applicant" shall include school directors, school owners and pending instructors.

#### **R162-8-2. Determining Fitness for School Certification.**

8.2 In order to be certified as a real estate school, the school directors and owners of the school must have integrity and be honest, truthful, reputable and competent. The determination of whether an applicant possesses these qualifications will be made by the Division, with the concurrence of the Commission.

8.2.1 In determining fitness for certification, the Division and Commission will consider information which shall include the following:

(a) whether the applicant has had a license to practice in the real estate profession, or any other regulated profession or occupation, denied, restricted, suspended, or revoked or subjected to any other disciplinary action by this or another jurisdiction.

(b) whether the applicant has been permitted to resign or surrender a real estate license or any other professional license or has ever allowed a license to expire while the applicant was under investigation by, or while action was pending against the applicant by a real estate licensing or any other regulatory agency.

(c) whether any action is pending against the applicant by any real estate licensing or other regulatory agency.

(d) whether the applicant is currently under investigation for, or charged with, or has ever been con-

victed of or pled guilty or no contest to, or entered a plea in abeyance to, a misdemeanor or felony.

(e) whether the applicant has ever been placed on probation or ordered to pay a fine or restitution in connection with any criminal offense or a licensing action.

(f) whether a civil judgment has ever been entered against the applicant based on fraud, misrepresentation or deceit, and whether the judgment has been fully satisfied.

(g) whether restitution ordered by a court in a criminal conviction has been fully satisfied;

(h) whether the probation in a criminal conviction or a licensing action has been completed and fully served; and

(i) whether there has been subsequent good conduct on the part of the applicant. If, because of lapse of time and subsequent good conduct and reputation or other reason deemed sufficient, it shall appear to the Commission and the Division that the interest of the public will not likely be in danger by the granting of a certification, the Commission and the Division may approve the applicant relating to honesty, integrity, truthfulness, reputation and competency.

#### **R162-8-3. School Application for Certification.**

8.3 A school offering prelicensing education must be certified by the Division of Real Estate before providing any education. Each school requesting approval of an educational program designed to meet the prelicensing education requirements must make application for approval on the form prescribed by the Division. The application must include the application fee, as authorized by Section 61-2-9(5)(d), and the following information which will be used in determining the school's eligibility for approval:

8.3.1 Name, phone number and address of the school, school director, and all owners of the school;

8.3.2 A description of the type of school and a description of the school's physical facilities;

8.3.2.1 All courses must be taught in an appropriate classroom facility and not in any private residence, except for courses approved for specific home-study purposes.

8.3.3 A comprehensive course outline including a description of the course, the length of time to be spent on each subject area broken into class periods, and a minimum of three to five learning objectives for every three hours of classroom time, and applicable application fee;

8.3.3.1 All courses of study will meet the minimum standards set forth in the State of Utah Standard Course Outline provided for each approved course. The school may alter the sequence of presentation of the required topics.

8.3.3.2 All courses of study will meet the minimum hourly requirement of that course. A credit hour is defined as 50 minutes of supervised contact by a certified instructor within a 60 minute time period. A 10 minute break will be given for each 50 minutes in class. Education credit will be limited to a maximum of eight credit hours per day. The limitation applies only to the credit a student may receive and is not intended to limit the number of classroom hours offered.

8.3.4 A list of each certified instructor and adjunct instructor the school intends to use and the instructor certification number which has been issued by the Division.

8.3.4.1 A college or university may use any faculty member to teach an approved course provided the

instructor demonstrates to the satisfaction of the Division academic training or experience qualifying him to teach the course.

8.3.4.2 The school shall submit the name of any guest lecturer and a resume which defines the knowledge and expertise of the guest. Names shall be submitted prior to the guest being used by the school.

8.3.5 An itemization of methods of instruction, including lecture method, slide presentation, cassette, videotape, movie, or other method. Absent special approval from the Division:

8.3.5.1 Non-lecture methods of instruction will be limited to a total of 50% of the allotted credit hours.

8.3.5.2 Non-lecture methods of instruction will have an accompanying workbook for the student to complete during the viewing time. The schools shall submit copies of the workbooks to the Division.

8.3.5.3 Non-lecture methods of instruction will have a certified instructor available to answer questions within at least 24 hours after the presentation.

8.3.6 A copy of at least two final examinations of the course and the answer keys which are used to determine if the student has passed the exam, accompanied by an explanation of what the procedure is if the student fails the final examination and thereby fails the course.

8.3.6.1 A maximum of 10% of the required class time may be spent in testing, including practice tests and the final examination. A student cannot challenge a course or any part of a course of study in lieu of attendance.

8.3.7 A list of the titles, authors and publishers of all required textbooks;

8.3.7.1 All texts, workbooks, supplement pamphlets and any other materials must be appropriate and current in their application to the required course outline.

8.3.8 Days, times and locations of classes;

8.3.8.1 A college or a university may schedule its courses within the criteria of its regular schedule, for example, quarter, semester, or other. A college quarter hour credit is the equivalent of 10 classroom hours, and a college semester hour credit is the equivalent of 15 classroom hours.

8.3.9 A copy of the statement which shall be provided for each student outlining the days, times and locations of classes; the number of quizzes and examinations; the grading system, including methods of testing and standards of grading; the requirements for attendance; the school's evidence of notification to candidates of the qualifying questionnaire, and the school's refund policy.

8.3.9.1 The statement to the student shall state in capital letters no smaller than 1/4 inch the following language: "Any student attending the (school name) is under no obligation to affiliate with any of the real estate brokerages that may be soliciting for agents at this school."

8.3.10 Any other information as the Division may require.

#### **R162-8-4. School Certification.**

8.4 When a school has met all conditions of certification, and upon approval by the Division, a school will be issued certification. All certifications expire December 31 of each year. Conditions of certification include the following:

8.4.1 A school shall teach the approved course of study as outlined in the State Approved Course Outline.

8.4.2 A school shall require each student to attend the required number of hours and pass a final examination. A school shall maintain a record of each student's attendance for a minimum of five years after enrollment.

8.4.3 A school shall not accept a student for a reduced number of hours without first having a written statement from the Division which defines the exact number of hours the student needs.

8.4.4 A school shall not make any misrepresentation in its advertising about any course of instruction, and shall be able to provide substantiation of any claims made. All advertising and public notices shall be free of statements or implications which do not enhance the dignity and integrity of the real estate profession. A school shall not make disparaging remarks about a competitor's services or methods of operation.

8.4.5 A school shall limit approved guest lecturers who are experts in related fields to a total of 20% of the instructional hours per approved course. A guest lecturer shall provide evidence of professional qualifications to the Division prior to being used as a guest lecturer.

8.4.6 Within 15 calendar days after the occurrence of any material change in the school which would affect its approval, the school shall give the Division written notice of that change.

8.4.7 A school shall not attempt by any means to obtain or use the questions on the prelicensing examinations unless the questions have been dropped from the current exam bank.

8.4.8 A school shall not give any valuable consideration to a real estate brokerage for having referred students to the school. A school shall not accept valuable consideration from a brokerage for having referred students to the brokerage.

8.4.8.1 If the school agrees, real estate brokerages may be allowed to solicit for agents at the school. No solicitation may be made during the class time nor during the student break time. Solicitation may be made only after the regularly scheduled class so that no student will be obligated to stay for the solicitation.

8.4.9 A school shall use only certified instructors or guest lecturers who have been registered with the Division.

8.4.10 A school's owners and director shall be solely responsible for the quality of instruction in the school and for adherence to the state laws and regulations regarding school and instructor certification.

8.4.10.1 A school director shall provide the instructor with the approved content outline for each course and shall assure the content has been taught.

#### **R162-8-5. Determining Fitness for Instructor Certification.**

8.5. In order to be certified as a real estate instructor, the instructor applicant must have integrity and be honest, truthful, reputable and competent. The determination of whether an applicant possesses these qualifications will be made by the Division, with the concurrence of the Commission.

8.5.1. In determining fitness for certification, the Division and Commission will consider information which shall include the following:

(a) whether the applicant has had a license to practice in the real estate profession, or any other regulated profession or occupation, denied, restricted, suspended, or revoked or subjected to any other disciplinary action by this or another jurisdiction.

(b) whether the applicant has been permitted to resign or surrender a real estate license or any other

professional license or has ever allowed a license to expire while the applicant was under investigation by, or while action was pending against the applicant by a real estate licensing or any other regulatory agency.

(c) whether any action is pending against the applicant by any real estate licensing or other regulatory agency.

(d) whether the applicant is currently under investigation for, or charged with, or has ever been convicted of or pled guilty or no contest to, or entered a plea in abeyance to, a misdemeanor or felony.

(e) whether the applicant has ever been placed on probation or ordered to pay a fine or restitution in connection with any criminal offense or a licensing action.

(f) whether a civil judgment has ever been entered against the applicant based on fraud, misrepresentation or deceit and whether the judgment has been fully satisfied.

(g) whether restitution ordered by a court in a criminal conviction has been fully satisfied;

(h) whether the probation in a criminal conviction or a licensing action has been complete and fully served; and

(i) whether there has been subsequent good conduct on the part of the applicant. If, because of lapse of time and subsequent good conduct and reputation or other reason deemed sufficient, it shall appear to the Commission and the Division that the interest of the public will not likely be in danger by the granting of a certification, the Commission and the Division may approve the applicant relating to honesty, integrity, truthfulness, reputation and competency.

#### **R162-8-6. Instructor Application for Certification.**

8.6 An instructor shall not teach a prelicensing course by himself without having been certified by the Division prior to teaching. Each instructor and each adjunct instructor requesting approval to be certified to teach the education requirements of real estate licensing must make application for approval on a form prescribed by the Division.

8.6.1 The instructor and the adjunct instructor applicant will demonstrate the initial ability to teach by either meeting the minimum point requirement outlined on the application form or by receiving a conditional approval granted by the division. The application form shall be received by the Division before the instructor applicant can begin to teach in the classroom.

8.6.1.1 In the event an instructor candidate fails to meet the minimum point requirement outlined on the application form, and upon written recommendation from the certified school, the division may issue a conditional approval for the candidate to proceed into the instructor apprentice program.

8.6.1.2 The applicant receiving a conditional approval from the division will complete the apprentice teaching as outlined in 8.6.2.2 and 8.6.2.3 or as outlined in 8.6.4.1 and 8.6.4.2. and will be audited during the apprentice teaching by the education director of the division using the same evaluation form being used by the students.

8.6.1.3 The applicant receiving a conditional approval will need to receive the same satisfactory recommendation as outlined in 8.6.2.4 or 8.6.4.3 in addition to approval from the education director of the division before becoming certified.

8.6.2 The instructor applicant for the 90 hour salesagent prelicensing course will complete an in-

structor apprentice program, the requirements of which are the following:

8.6.2.1 The instructor applicant will either audit each course to be taught by him and prepare teaching notes on the course of study; or

8.6.2.2 The instructor applicant will co-teach the course with a fully certified instructor; and thereafter

8.6.2.3 The instructor applicant will teach the course under the direction of a fully certified instructor. The instructor will teach the curriculum as provided by the school.

8.6.2.4 The school will provide to the division evidence of a satisfactory recommendation made by the certified instructor and the school director. The school will also provide to the division satisfactory evaluations of the apprentice instructor made by the students attending the class the instructor taught as an apprentice. The evaluations will be graded on a 5-point scale, and the apprentice instructor must have received a minimum of a 3.5 point average on the evaluations.

8.6.2.5 The instructor applicant shall pass an examination designed to test the knowledge of the subject matter proposed to be taught.

8.6.2.6 This instructor, once certified, shall have the authority to teach all segments of the sales agent curriculum and any classes certified for continuing education regarding real estate principles and practices.

8.6.3 The instructor applicant for a broker prelicensing subcourse will be a principal broker, an associate broker or a branch broker and will meet the following criteria:

8.6.3.1 Brokerage Management. The instructor applicant must be a licensed broker and have managed a real estate office, or hold a CRB or equivalent designation in real estate brokerage management. The instructor applicant must have at least two years practical experience as an active real estate principal broker.

8.6.3.2 Advanced Real Estate Law. The instructor applicant must be a current member of the Utah Bar Association or have graduated from an American Bar Association law school. The instructor applicant must have at least two years practical experience in the field of real estate law.

8.6.3.3 Advanced Appraisal. The instructor applicant must be a state certified appraiser and hold a MAI or equivalent designation. The instructor applicant must have at least two years practical experience in appraising.

8.6.3.4 Advanced Finance. The instructor applicant must have been associated with a lending institution as a loan officer or have a degree in finance. The instructor applicant must have at least two years practical experience in real estate finance.

8.6.3.5 Advanced Property Management. The instructor applicant must be a real estate licensee. The instructor applicant must hold a CPM or equivalent designation. The instructor applicant must have at least two years full-time experience as a property manager.

8.6.3.6 Equivalent Qualifications. The instructor applicant must have other experience, education, or credentials which are equivalent to any of the above as determined by the Division and the Commission.

8.6.4 The adjunct instructor applicant may be certified to teach a portion of the sales agent prelicensing course or a portion of a broker subcourse with certification limited to teaching a specific subject. The

applicant will complete an instructor apprentice program, the requirements of which are the following:

8.6.4.1. The instructor applicant will either audit each course to be taught by him and prepare teaching notes on the course of study; or

8.6.4.2 The instructor applicant will co-teach the specific subject with a fully certified instructor; and thereafter

8.6.4.3 The instructor applicant will teach the specific subject under the direction of a fully certified instructor. The instructor will teach the curriculum as provided by the school.

8.6.4.4 The school will provide to the division evidence of a satisfactory recommendation made by the certified instructor and the school director. The school will also provide to the division satisfactory evaluations of the apprentice instructor made by the students attending the class the instructor taught as an apprentice. The evaluations will be graded on a 5-point scale, and the apprentice instructor must have received a minimum of a 3.5 point average on the evaluations.

#### **R162-8-7. Instructor Certification Renewal.**

8.7 Upon approval by the Division, an instructor applicant will be issued certification. All original certifications expire the following December 31 of the first full year following certification.

8.7.1 Subsequent certifications expire two years later on December 31. Conditions of renewal of certification include providing proof of the following:

8.7.1.1 Must have taught at least 20 hours of in-class instruction in a certified real estate course during the preceding two years;

8.7.1.2 Must have attended a real estate instructor development workshop sponsored by the Division during the preceding two years; and

8.7.1.3 Must have completed 12 hours of live education taken in a real estate related subject in addition to the 12 hours of continuing education required for license renewal, and will provide a written evaluation of the course(s) and instructor(s) to the Division at time of renewal on a specific instructor evaluation form provided by the Division.

8.7.2 If the renewal fee and documentation are not received within the prescribed time period, the certification shall expire.

8.7.2.1 When a certification expires, the certification may be renewed for a period of thirty days after the expiration date upon payment of a non-refundable late fee in addition to the requirements of R162-8-7(8.7.1.1) - R162-8-7(8.7.1.3).

8.7.2.2 After the period of thirty days, those instructors and adjunct instructors not meeting the conditions for renewal of certification must apply as an original applicant.

#### **R162-8-8. Administrative Proceedings.**

8.8 The Division may deny certification or renewal of certification to any school or instructor that does not meet the standards required by this chapter.

8.8.1 Formal adjudicative proceedings. Any adjudicative proceedings as to the following matters shall be conducted on a formal basis:

8.8.1.1 The revocation or suspension of certification of real estate schools or instructors.

8.8.2 Informal adjudicative proceedings. Any adjudicative proceedings as to the following matters shall be conducted on an informal basis:

8.8.2.1 The issuance or renewal of certification of real estate schools or instructors.

**References:** 61-2-5.5.

**History:** 10295, AMD, 01/02/90; 11297, AMD, 12/17/90; 12628, AMD, 06/24/92; 15504, AMD, 03/03/94; 15803, AMD, 06/14/94; 17426, AMD, 01/25/96; 19599, 5YR, 07/01/97; 23128, AMD, 10/17/2000.

**R162-9. Continuing Education.**

- R162-9-1. Objective.
- R162-9-2. Education Providers.
- R162-9-3. Course Certification Criteria.
- R162-9-4. Instructor Certification Criteria.
- R162-9-5. Submission of Course for Certification.
- R162-9-6. Conditions to Certification.
- R162-9-7. Course and Instructor Evaluations.

**R162-9-1. Objective.**

9.1 Through education, the licensee shall be reasonably current in real estate knowledge and shall have improved ability to provide greater protection and service to the real estate consumer, thereby meeting the Real Estate Commission's primary objective of protection of and service to the public.

9.1.1 A licensee renewing a sales agent or broker license shall be required to provide evidence of having taken 12 classroom hours of certified real estate education within the two-year period preceding the licensee's renewal date.

9.1.1.1 A minimum of three of the 12 hours must be taken in a "core" course, the subject of which will be designated by the Division to keep a licensee current in changing practices and laws.

**R162-9-2. Education Providers.**

9.2 Continuing education providers may apply to the Division for certification of their courses.

9.2.1 Approved providers may include accredited colleges and universities, public or private vocational schools, national and state real estate related professional societies and organizations, real estate boards, and proprietary schools.

9.2.2 Those real estate education providers who have been certified for continuing education courses in a minimum of three other states and have specific standards in place for development of their courses and approval of their instructors, and who will provide that criteria to the division of real estate for a one-time approval, may be granted certification of their courses with no further application being necessary.

9.2.3 Licensees may apply to the division for continuing education credit for a non-certified real estate course taken from a national provider that the licensee believes will improve his ability to better protect or serve the public.

9.2.3.1 A licensee may request approval of the course from the division and, for an appropriate fee, the division will review the merits of the non-certified course and determine whether the course meets the criteria for Utah real estate continuing education.

**R162-9-3. Course Certification Criteria.**

9.3 Courses submitted for certification shall have significant intellectual or practical content and shall serve to increase the professional competence of the licensee, thereby meeting the objective of the protection of and service to the public.

9.3.1 Three hours shall be comprised of "core course" curricula, the subjects of which will be determined by the division and the Real Estate Commission.

The subject matter of these courses will be for the purpose of keeping a licensee current in changing practices and laws. These courses may be provided by the division or by private education providers but, in all cases, will have prior certification by the division.

9.3.1.1 Principal brokers and associate brokers may use the Division's Trust Account Seminar to satisfy the "core" course requirement once every three renewal cycles.

9.3.2 The remaining nine hours shall be in substantive areas dealing with the practice of real estate. Acceptable course criteria shall include the following:

9.3.2.1 Real estate financing, including mortgages and other financing techniques; real estate investments; accounting and taxation as applied to real property; estate building and portfolio management; closing statements; real estate mathematics;

9.3.2.2 Real estate law; contract law; agency and subagency; real estate securities and syndications; regulation and management of timeshares, condominiums and cooperatives; real property exchanging; real estate legislative issues; real estate license law and administrative rules;

9.3.2.3 Land development; land use, planning and zoning; construction; energy conservation;

9.3.2.4 Property management; leasing agreements; accounting procedures; management contracts; landlord/tenant relationships;

9.3.2.5 Fair housing; affirmative marketing; Americans with Disabilities Act;

9.3.2.6 Real estate ethics.

9.3.2.7 Using the computer, the Internet, business calculators, and other technologies to enhance the licensee's service to the public.

9.3.2.8 Offerings concerning sales promotion, including salesmanship, negotiation, sales psychology, marketing techniques, servicing your clients, or similar offerings.

9.3.2.9 Offerings in personal and property protection for the licensee and his clients.

9.3.3 Non-acceptable course criteria shall include courses similar to the following:

9.3.3.1 Offerings in mechanical office and business skills, such as typing, speed reading, memory improvement, language report writing, advertising, or similar offerings;

9.3.3.2 Offerings concerning physical well-being or personal development, such as personal motivation, stress management, time management, dress-for-success, or similar offerings;

9.3.3.3 Meetings held in conjunction with the general business of the licensee and his broker or employer, such as sales meetings, in-house staff or licensee training meetings;

9.3.4 The minimum length of a course shall be one credit hour. A credit hour is defined as 50 minutes within a 60-minute time period.

**R162-9-4. Instructor Certification Criteria.**

9.4 Instructors for continuing education purposes will be evaluated and approved separately from the continuing education courses.

9.4.1 The instructor applicant must meet the same requirements as a certified precertifying instructor as defined in R162-8.4.1; and

9.4.2 The instructor applicant must demonstrate knowledge of the subject matter by submission of proof of the following:

9.4.2.1 At least five years experience in a profession, trade or technical occupation in a field directly related

to the course which the applicant intends to instruct; or

9.4.2.2 A bachelors or postgraduate degree in the field of real estate, business, law, finance, or other academic area directly related to the course which applicant intends to instruct; or

9.4.2.3 Any combination of at least five years of full-time experience and college-level education in a field directly related to the course which the applicant intends to instruct; or

9.4.3 The instructor applicant must demonstrate evidence of the ability to communicate the subject matter by the submission of proof of the following:

9.4.3.1 A state teaching certificate or showing successful completion of appropriate college courses in the field of education; or

9.4.3.2 A professional teaching designation from the National Association of Realtors or the Real Estate Educators Association; or

9.4.3.3 Evidence, such as instructor evaluation forms or letters of reference, of the ability to teach in schools, seminars, or in an equivalent setting.

#### **R162-9-5. Submission of Course for Certification.**

9.5 An applicant shall apply for consideration of certification of a course to the Division of Real Estate not less than 60 days prior to the anticipated date of the first class.

9.5.1 The application shall include a non-refundable filing fee of \$35.00 and an instructor certification fee of \$15.00 per course per instructor. Both fees should be made payable to the Division of Real Estate.

9.5.2 The application shall be made on the form approved by the Division which shall include the following information:

9.5.2.1 Name, phone number and address of the sponsor of the course, including owners and the coordinator or director responsible for the offering;

9.5.2.2 The title of the course offering including a description of the type of training; for example, seminar, conference, correspondence course, or similar offering;

9.5.2.3 A copy of the course curriculum including a course outline of the comprehensive subject matter with the length of time to be spent on each subject area broken into segments of no more than 15 minutes each, the instructor for each segment, and the teaching technique used in each segment;

9.5.2.4 Three to five learning objectives for every three hours of the course and the means to be used in assessing whether the learning objectives have been reached;

9.5.2.5 A complete description of all materials to be distributed to the participants;

9.5.2.6 The date, time and locations of each course;

9.5.2.7 The tuition or registration fee and a copy of the cancellation and refund policy;

9.5.2.8 The procedure for pre-registration and for taking and maintaining control of attendance during class time;

9.5.2.9 The difficulty level of the course categorized by beginning, intermediate or advanced;

9.5.2.10 A sample of the proposed advertising to be used, if any;

9.5.2.11 An instructor application on a form approved by the Division including the information as defined in R162-9-4;

9.5.2.12 A signed statement agreeing to allow the course to be randomly audited on an unannounced basis by the Division or its representative;

9.5.2.13 A statement defining how the course will meet the objectives of continuing education by providing education of a current nature and how it will improve the licensee's ability to provide greater protection of and service to the public;

9.5.2.14 A signed statement agreeing not to market personal sales product.

9.5.2.15 A sample of the completion certificate, or the completion certificate required by the division, if any, that will be issued which shall bear the following information:

(a) Space for the licensee's name, type of license and license number, date of course

(b) The name of the course provider, course title, hours of credit, certification number, and certification expiration date;

(c) Space for signature of the course sponsor and a space for the licensee's signature.

9.5.2.16 Signature of the course coordinator or director.

9.5.3 Application for a video course will include all information as defined in R162-9-5-2 except for R162-9-5-2-6 and R162-9-5-2-8. The application will also include a copy of the video.

9.5.3.1 If it is the intention of the course provider that the video course is to be viewed other than in a certified school, the application will also include the following:

(a) The method for determining that each home assignment has been completed by the registered student; and

(b) The method for correcting home assignments and workbooks, and the procedure for notifying the student if the assignment has not been done correctly; and

(c) A copy of the home assignment and the workbook material.

#### **R162-9-6. Conditions to Certification.**

9.6.1 Upon completion of the educational program the course sponsor shall provide the certificate of attendance only to those students who attend a minimum of 90% of the required class time. Within 10 days of the end of the course, the sponsor shall provide to the Division a roster of students and their license numbers for whom certificates were issued.

9.6.2 A course sponsor shall maintain for three years a record of attendance of each person attending an offering and any other prescribed information regarding the offering, including exam results, if any.

9.6.3 Whenever there is a material change in a certified course, for example, curriculum, course length, instructor, refund policy, the sponsor shall promptly notify the Division in writing.

9.6.4 All course certifications shall be valid for one year after date of approval by the Division.

9.6.5 Instructor certifications shall expire December 31 of each year. Instructors who certify for the first time by September 30 shall renew December 31 of that same year. Instructors who certify for the first time after October 1 shall renew December 31 of the following year.

9.6.5.1 To renew instructor certification an instructor must teach, during the year prior to renewal, a minimum of one class in each course for which certification is sought.

9.6.5.2 If the instructor has not taught during the year and wishes to renew certification, written explanation shall be submitted outlining the reason for not instructing the course, including documentation sat-

isfactory to the Division as to the present level of expertise in the subject matter of the course.

#### **R162-9-7. Course and Instructor Evaluations.**

9.7 The Division shall cause the course to be evaluated for adherence to course content and other prescribed criteria, and for the effectiveness of the instructor.

9.7.1 At the end of each course each student shall complete a standard evaluation form provided by the Division. The forms shall be collected at the end of the class in an envelope and the course provider will mail the sealed envelope to the Division within 10 days of the last class.

9.7.2 On a random basis the Division will assign monitors to attend a course for the purpose of evaluating the course and the instructor. The monitors will complete a standard evaluation form provided by the Division which will be returned to the Division within 10 days of the last class.

**References:** 61-2-5.5.

**History:** 9152, PRO, 01/01/88; 11298, AMD, 12/17/90; 11986, AMD, 09/03/91; 12726, AMD, 06/24/92; 13053, AMD, 09/14/92; 15505, AMD, 03/03/94; 17427, AMD, 01/25/96; 20147, 5YR, 10/21/97; 21969, AMD, 06/03/99.

#### **R162-10. Administrative Procedures.**

R162-10-1. Formal Adjudicative Proceedings.

R162-10-2. Informal Adjudicative Proceedings.

R162-10-3. Proceedings Not Designated.

##### **R162-10-1. Formal Adjudicative Proceedings.**

10.1 Any adjudicative proceeding as to the following matters shall be conducted on a formal basis:

10.1.1. Except as otherwise expressly provided herein, the revocation, suspension or probation of a real estate license, school or instructor certification or fine levied against a licensee.

10.1.2. The revocation, suspension or probation of any registration issued pursuant to the Time Share and Camp Resort Act.

10.1.3. Any proceedings conducted subsequent to the issuance of cease and desist orders.

##### **R162-10-2. Informal Adjudicative Proceedings.**

10.2 Any adjudicative proceedings as to the following matters shall be conducted on an informal basis:

10.2.1. The issuance of a real estate license, the renewal of an active, inactive or expired license, or the activation of an inactive license.

10.2.2. Any action on a sales agent's license based upon the revocation or suspension of a principal broker's license or the failure of the principal broker to renew his license.

10.2.3. The issuance of renewal or certification of real estate schools or instructors.

10.2.4. The revocation of a real estate license due to payment made from the Real Estate Recovery Fund.

10.2.5. The issuance, renewal, suspension or revocation of registration pursuant to the Land Sales Practices Act.

10.2.6. The exemption from, or the amendment of, registration pursuant to the Land Sales Practices Act.

10.2.7. The issuance or renewal of any registration pursuant to the Time Share and Camp Resort Act.

10.2.8. Any waiver of, or exemption from, registration requirements pursuant to the Time Share and Camp Resort Act.

10.2.9. The issuance of any declaratory order determining the applicability of a statute, rule or order when enforcement or implementation of the statute, rule or order lies within the jurisdiction of the Division of Real Estate.

10.2.10. The post-revocation hearing following the revocation of license pursuant to Utah Code Section 61-2-9(1)(e)(i) for failure to accurately disclose a criminal history.

10.2.11. A hearing on whether or not a licensee or certificate holder whose license or certificate was issued or renewed on probationary status has violated the condition of that probation.

##### **R162-10-3. Proceedings Not Designated.**

10.3. All adjudicative proceedings as to any other matters not specifically listed herein shall be conducted on an informal basis.

**References:** 61-2-5.5, 63-46b-1(5).

**History:** 9153, PRO, 01/01/88; 11299, NSC, 12/10/90; 15506, NSC, 03/01/94; 17379, 5YR, 12/01/96; 20805, AMD, 04/23/98; 22624, AMD, 03/20/2000; 23258, 5YR, 10/24/2000.

#### **R162-101. Authority and Definitions.**

R162-101-1. Authority.

R162-101-2. Definitions.

##### **R162-101-1. Authority.**

101.1 The following administrative rules, applicable to the Division of Real Estate, Department of Commerce, have been established under the authority granted by Section 61-2b-6(1).

101.1.1 The authority to establish and collect fees is granted by Section 61-2b-37.

##### **R162-101-2. Definitions.**

101.2.1 AQB: the Appraiser Qualifications Board of The Appraisal Foundation, 1029 Vermont Avenue, N.W., Suite 900, Washington, D.C. 20005.

101.2.2 Board: the Utah Appraiser Licensing and Certification Board.

101.2.3 Classification: the type of registration, license, or certification held by an appraiser.

101.2.4 Division: the Division of Real Estate of the Department of Commerce.

101.2.5 Reinstatement: renewing a license, registration, or certification for an additional period after its expiration date has passed but prior to six months after the expiration date.

101.2.6 Renewal: extending a license, registration, or certification for an additional period upon its expiration.

101.2.7 Unclassified individual: An individual who does not hold any appraisal classification issued by the Division.

101.2.8 USPAP: The Uniform Standards of Professional Appraisal Practice published by The Appraisal Foundation, 1029 Vermont Avenue, N.W., Suite 900, Washington, D.C. 20005.

**References:** 61-2b-20 to 61-2b-31.

**History:** 13166, NEW, 09/14/92; 15507, NSC, 03/01/94; 15540, AMD, 03/17/94; 19264, AMD, 07/08/97; 19887, 5YR, 09/12/97; 22000, EMR, 05/03/99; 22060, AMD, 07/16/99.



**R162-102. Application Procedures.**

- R162-102-1. Application.
- R162-102-2. Status Change.
- R162-102-3. Renewal.
- R162-102-4. Six-Month Temporary Permits.
- R162-102-5. Reciprocity.

**R162-102-1. Application.**

102.1.1 Initial Review - An applicant for licensure or certification as an appraiser will be required to submit, on forms provided by the Division, documentation indicating successful completion of the education and experience required by the state of Utah.

102.1.1.1 The application may be reviewed by an Appraiser Education Review Committee appointed by the Real Estate Appraiser Licensing and Certification Board to determine if the education requirement has been met.

102.1.1.2 The candidate will provide evidence of meeting the experience requirement by completing the form required by the Division.

**102.1.2 Exam Application**

102.1.2.1 Upon determining the candidate has completed the education and experience requirements, the Division will issue an examination application form to the candidate.

102.1.2.2 The candidate will make application to take the examination by returning the application form and the appropriate testing fee to the testing service designated by the Division. If the applicant fails to take the examination, the fee will be forfeited.

**102.1.3 Final Application**

102.1.3.1 Within 90 days after successful completion of the exam, the appraiser applicant must return to the Division each of the following:

102.1.3.1.1 A report from the testing service indicating successful completion of the exam.

102.1.3.1.2 The license application form required by the Division. The application form shall include the applicant's business and home addresses. A post office box without a street address is unacceptable as a business or home address. The applicant may designate either address to be used as a mailing address.

102.1.3.1.3 The appropriate license or certification fee, which will include the fee for the federal registry.

**R162-102-2. Status Change.**

102.2.1 A registered, licensed or certified appraiser must notify the Division within ten working days of any status change. Status changes are effective on the date the properly executed forms and appropriate fees are received by the Division. Notice must be made in writing on the forms required by the Division.

102.2.1.1 Change of name requires submission of official documentation such as a marriage or divorce certificate, or driver's license.

102.2.1.2 Change of business, home address or mailing address requires written notification. A post office box without a street address is unacceptable as a business or home address. Any address may be designated as a mailing address.

102.2.2 Registered or State-licensed Appraisers, upon meeting the appropriate requirements for certification and upon filing a completed application within six months from their last renewal, will be allowed to transfer to the categories of either Certified Residential or Certified General by paying only a transfer fee and the fee for the federal registry.

102.2.2.1 Transfer to a certified category will not change the individual's expiration date.

**R162-102-3. Renewal.**

102.3.1 At least 30 days before expiration, a renewal notice shall be sent by the Division to the registered, licensed or certified appraiser at the mailing address shown on the Division records. The applicant for renewal must return the completed renewal notice and the applicable renewal fee to the Division on or before the expiration shown on the notice.

102.3.1.1 The registered, licensed, senior appraiser, or certified appraiser must return proof of completion of 28 hours of continuing education taken during the preceding two years.

102.3.1.1.1 Even though the appraiser may have changed licensing categories, every third time the appraiser renews, the appraiser will provide evidence of having completed, within the two years prior to the third renewal, a course in the Uniform Standards of Professional Appraisal Practice. This USPAP course will be a 15-hour course and will include passing of a final exam. This 15 hours of credit may be used to meet part of the continuing education requirement for that renewal period. The appraiser must obtain and study the Utah Real Estate Appraiser Licensing and Certification Act and the rules promulgated thereunder and must sign an attestation that he understands and will abide by them.

102.3.1.1.2 Those State-Licensed Appraisers who were Senior Appraisers prior to May 3, 1999 and who completed a USPAP course after January 1, 1993 will not be required to complete the USPAP course again in order to renew until their third renewal following the date upon which they completed the USPAP course.

102.3.1.1.3 Those appraisers who were State-Registered Appraisers prior to May 3, 2001 and who completed a USPAP course after January 1, 1993 will not be required to complete the USPAP course again in order to renew until their third renewal following the date upon which they completed the USPAP course.

102.3.2 If the renewal fee and documentation are not received within the prescribed time period, the registration, license or certification shall expire.

102.3.2.1 A registration, license or certification may be renewed for a period of 30 days after the expiration date upon payment of a late fee in addition to the requirements of Section 102.3.1.

102.3.2.2 After this 30-day period and until six months after the expiration date, the registration, license or certification may be reinstated upon payment of a reinstatement fee in addition to the requirements of Section 102.3.1. It shall be grounds for disciplinary sanction if, after the expiration date, the individual continues to perform work for which a registration, license or certification is required.

102.3.2.3 A person who does not renew a registration, license or certification within six months after the expiration date shall be reregistered, relicensed or recertified as prescribed for an original application. The applicant will receive credit for previously credited prelicensing education. Applicants for a new license or certification will be required to complete a USPAP course and retake the examination for the classification for which they are applying.

102.3.3 If the Division has received renewal documents in a timely manner but the information is incomplete, the appraiser shall be extended a 15-day grace period to complete the application.

**R162-102-4. Six-Month Temporary Permits.**

102.4.1 A non-resident of this state may obtain a permit for a period of six months to practice as an appraiser in this state. An applicant must:

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102.4.1.1 Submit an application in writing requesting temporary licensure or certification;

102.4.1.2 Answer and submit a "Utah Appraiser Qualifying Questionnaire" in the form designated by the Division;

102.4.1.3 Sign an irrevocable consent to service authorizing the Division to receive service of any lawful process on his behalf in any noncriminal proceeding arising out of his practice as an appraiser in this state;

102.4.1.4 Pay an application fee in the amount established by the Division; and

102.4.1.5 Provide the starting date of the appraisal assignment for which the temporary permit is being obtained.

102.4.2 A temporary permit may be renewed once by paying an additional fee and submitting the forms required by the Division.

#### **R162-102-5. Reciprocity.**

102.5.1 An individual who is licensed or certified as an appraiser by another state may be licensed or certified in Utah by reciprocity on the following conditions:

102.5.1.1 The other state must have required the applicant to satisfactorily complete classroom hours of appraisal education approved by that state which are substantially equivalent in number to the hours required for the class of licensure or certification for which he is applying in Utah;

102.5.1.2 The education must have included a course in the Uniform Standards of Professional Appraisal Practice;

102.5.1.3 The applicant must obtain and study the Utah Real Estate Appraiser Registration and Certification Act and the rules promulgated thereunder and must sign an attestation that he understands and will abide by them;

102.5.1.4 The applicant must have passed an examination which has been approved by the AQB for the class of licensure or certification for which he is applying;

102.5.1.5 If the applicant resides outside of the state of Utah, he must sign an irrevocable consent to service authorizing the Division to receive service of any lawful process on his behalf in any noncriminal proceeding arising out of his practice as an appraiser in this state;

102.5.1.6 The applicant must provide a complete licensing history sent directly to the Division by his home state and any other state in which he has been licensed, which shall include the applicant's full name, home and business addresses and telephone numbers, the date first licensed, the type or types of licenses or certifications held, the date the current license or certification expires, and a statement concerning whether disciplinary action has ever been taken, or is pending, against the individual;

102.5.1.7 The applicant shall not have been convicted of a criminal offense involving moral turpitude relating to his ability to provide services as an appraiser; and

102.5.1.8 The applicant must agree, as a condition of licensure or certification, that he will furnish to the Division upon demand all records requested by the Division relating to his appraisal practice in Utah. Failure to do so will be considered grounds for revocation of license or certification.

**References:** 61-2b-23.

**History:** 18881, NEW, 05/16/97; 21335, AMD, 10/02/98; 21915, AMD, 06/10/99; 22001, EMR, 05/03/99; 22061, AMD, 07/16/99; 23174, AMD, 11/15/2000; 23267, AMD, 12/18/2000.

#### **R162-103. Appraisal Education Requirements.**

R162-103-1. Definitions.

R162-103-2. School Certification.

R162-103-3. Course Certification.

R162-103-4. Education Credit for Noncertified Courses.

R162-103-5. Instructor Application for Certification.

R162-103-6. Education Review Committee.

R162-103-7. Continuing Education Course Certification.

R162-103-8. Administrative Proceedings.

#### **R162-103-1. Definitions.**

103.1.1 For the purposes of this rule, "school" includes:

(a) An accredited college, university, junior college or community college;

(b) Any state or federal agency or commission;

(c) A nationally or state recognized real estate appraisal or real estate related organization, society, institute, or association;

(d) Any other school or organization as approved by the Board.

103.1.2 "School director" means an authorized individual in charge of the educational program at a school.

#### **R162-103-2. School Certification.**

103.2.1 Each school requesting certification shall make application for approval on the form prescribed by the Division, and shall submit the applicable fees. The application shall include, and the Board may consider, the following information in determining the school's eligibility for certification:

103.2.1.1 Name, phone number, and address of the school, school director and all owners of the school.

103.2.1.2 Attestation to upstanding moral character by individuals who are school directors or owners of the school, and whether any individual:

(a) has had a license or certification to practice in the appraisal profession, or any other profession or occupation, denied, restricted, suspended, or revoked.

(b) has been permitted to resign or surrender an appraiser license or certification, or has ever allowed an appraiser license or certification to expire while the individual was under investigation, or while action was pending against the individual by an appraiser licensing or any other agency

(c) has any action now pending by any appraiser licensing or other agency.

(d) is currently under investigation for, or charged with, or has ever pled guilty or no contest to, or been convicted of, a misdemeanor or felony, excluding minor traffic offenses.

(e) has ever been placed on probation in connection with any criminal offense or a licensing action.

103.2.1.3 A description of the type of school and a description of the school's physical facilities. All courses shall be taught in an appropriate classroom facility and not in any private residence, except for courses approved for specific home-study purposes;

103.2.1.4 A copy of the statement which shall be provided for each student outlining the days, times

and locations of classes; the number of quizzes and examinations; the grading system, including methods of testing and standards of grading; the requirements for attendance; and the school's refund policy.

103.2.2 A public school may schedule its courses within the criteria of its regular schedule, for example, quarter, semester, or similar schedule. A quarter hour of college credit is the equivalent of 10 classroom hours, and a semester hour of college credit is the equivalent of 15 classroom hours.

103.2.3 Upon approval by the Board, a school will be issued certification. All certifications expire January 1. Conditions of certification include the following:

(a) A school shall teach the approved course of study as outlined in the State Approved Course Outline;

(b) A school shall require each student to attend the required number of hours and pass a final examination;

(c) A school shall maintain a record of each student's attendance for a minimum of five years after his enrollment;

(d) A school shall not make any misrepresentation in its advertising about any course of instruction, and shall be able to provide substantiation of any claims made. All advertising and public notices shall be free of statements or implications which do not enhance the dignity and integrity of the appraisal profession. A school shall refrain from disparaging a competitor's services or methods of operation;

(e) Within 15 calendar days after the occurrence of any material change in the school which could affect its approval, including the events listed in R162-103.2.1.2, the school shall give the Division written notice of that change; and

(f) A school will not attempt by any means to obtain or use the questions on the state licensure or certification exam unless those questions have been dropped from the current exam bank.

(g) A school shall provide to all students at the time of registration a copy of the qualifying questionnaire the student will be required by the Division to answer as part of the precertification or precertification examination.

### R162-103-3. Course Certification.

103.3.1 Each school requesting approval of a course designed to meet the education requirements of licensure or certification shall make application for approval on a form prescribed by the Division and shall pay the applicable fee. The application shall include, and the Board may consider, the following information in determining eligibility for approval:

(a) A course outline including a description of the course, the length of time to be spent on each subject area broken into segments of no more than 30 minutes each, and three to five learning objectives for every three hours;

(b) Indication of any method of instruction other than lecture method including: a slide presentation, cassette, video tape, movie, home study, or other.

(c) A copy of the three final examinations of the course and the answer keys which are used to determine if the student has passed the course;

(d) An explanation of what the school procedure is for maintaining the security of the final exams and the answer keys;

(e) A list of the titles, authors and publishers of all required textbooks;

(f) A list of the instructors and evidence of their certification by the Division, and a list of any guest

lecturers to be used and evidence of their qualifications as an instructor for a specific course; and

(g) Days, times, and location of classes.

103.3.2 Upon approval by the Board, a course will be issued certification. All certifications expire January 1.

103.3.3 Each course of study will meet the minimum standards set forth in the State Approved Course Outline provided for each approved course. The school may alter the sequence of presentation of the required topics. Specific nonappraisal courses being used to satisfy the educational requirements shall have prior approval as to their applicability.

103.3.4 All courses of study will meet the minimum hourly requirement of that course. A credit hour is defined as 50 minutes of supervised contact by a certified instructor within a 60-minute time period. A 10-minute break will be given for each 50 minutes in class. Registration or certification credit will be limited to a maximum of eight credit hours per day. The limitation applies only to the credit a student may receive and is not intended to limit the number of classroom hours offered.

103.3.5 A public school or institution may use any faculty member to teach an approved course provided the individual demonstrates to the satisfaction of the Division and the Board academic training or appraisal experience qualifying him to teach the course.

103.3.6 Distance education is defined as any educational process based on the geographical separation of instructor and student (e.g., CD ROM, On-line learning, correspondence courses, video conferencing, etc.). Distance education courses must provide interaction between the learner and instructor and must include testing. A distance education course may be acceptable to meet the classroom hour requirement or its equivalent providing each course meets the following conditions:

103.3.6.1 The course (a) has been presented by an accredited college or university which offers distance education programs in other disciplines and where accreditation has been made by the Commission on Colleges or a regional accreditation association; or (b) has received approval for college credit by the American Council on Education's Program on Non-collegiate Sponsored Instruction, also known as PONSI; or (c) has been approved under the AQB Course Approval Program.

(a) The learner must successfully complete a written examination personally proctored by an official approved by the college or university or by the presenting entity; and

(b) The course must meet the requirements established by the AQB and be equivalent to the minimum of 15 classroom hours.

103.3.7 A maximum of 10% of the required class time may be spent in testing, including review test and final examination. A student cannot challenge a course or any part of a course of study by taking an exam in lieu of attendance.

103.3.7.1 If a student fails a school final examination, he will not be allowed to retest for a minimum of three days. The student will not be allowed to retake the same final exam, but will be given a new exam with different questions.

103.3.7.2 If the student fails the final exam a second time, he will not be allowed to retest for a minimum of two weeks at which time he will be given an entirely new exam with completely new questions. If the student fails this third exam, he will fail the course.

103.3.8 All texts, workbooks, supplement pamphlets and any other materials shall be appropriate and current in their application to the required course outline.

103.3.9 Within 15 calendar days after the occurrence of any material change in a course which could affect approval, the school shall give the Division written notice of the change.

#### **R162-103-4. Education Credit for Noncertified Courses.**

103.4.1 Education credit will be granted towards licensure or certification for an appraisal education course which has been taken and which has not been previously certified in Utah for prelicensing education credit, and has been provided by a school which meets the criteria as outlined in 103.1.

103.4.1.1 The course content shall have met the minimum standards set forth in the Utah State Approved Course Outline.

103.4.1.2 A course must be at least 15 hours in duration, including the examination. An hour is defined as 50 minutes of supervised contact by a certified instructor within a 60-minute time period.

103.4.1.3 A final examination will be administered at the end of each course pertinent to that education offering.

103.4.2 Credit will not be granted for a course taken in which the applicant obtained credit from the course provider by challenge examination without having attended the course.

103.4.3 Credit will not be given for duplicate or highly comparable classes. Each course must represent a progression in which the appraiser's knowledge is increased.

103.4.4 There is no time limit regarding when education credit must have been obtained.

103.4.5 Hourly credit for a course taken from a professional appraisal organization will be granted based upon the Division approved list which verifies hours for these courses.

103.4.6 Credit will only be granted for a course that has been successfully completed. Successful completion of a course means that the applicant has attended a minimum of 90% of the scheduled class hours, has completed all required exercises and assignments, and has achieved a passing score on a course final examination. The final examination shall not be an open book examination.

103.4.7 Submission for Education Approval.

103.4.7.1 Courses that have not been previously certified for prelicensing credit will be reviewed by the Education Review Committee. It is the responsibility of the applicant to establish that a particular education offering will qualify to meet the education requirement for licensing or certification.

103.4.7.2 The applicant shall submit on a form provided by the Division a list of the courses that documents the course title, the name of the sponsoring organization, the number of classroom hours, and the date the course was completed.

103.4.7.3 The applicant will attest on a notarized affidavit that the courses have been completed as documented.

103.4.7.4 The applicant will support the claim for education credit if requested by the Division by providing proof of completion of the courses in the form of certificates, transcripts, report cards, letters of verification, or similar proof.

103.4.7.5 Applicants having appraisal education in categories other than those in the State Approved

Course Outline may petition the Board on an individual basis for evaluation and approval of their education as being substantially equivalent to that required for licensing or certification.

#### **R162-103-5. Instructor Application for Certification.**

103.5.1 Each instructor requesting approval to be certified as an instructor to teach the education requirements of appraisal licensure or certification shall make application for approval on a form prescribed by the Division and shall submit the applicable fees. The application shall include, and the Board may consider, the following information in determining the instructor's eligibility for approval:

103.5.1.1 Attestation to upstanding moral character, including whether the individual:

(a) has had a license or certification to practice in the appraisal profession, or any other profession or occupation, denied, restricted, suspended, or revoked.

(b) has been permitted to resign or surrender an appraiser license or certification, or has ever allowed an appraiser license or certification to expire while the individual was under investigation, or while action was pending against the individual by an appraiser licensing or any other agency.

(c) has any action now pending by any appraiser licensing or other agency.

(d) is currently under investigation for, or charged with, or has ever pled guilty or no contest to, or been convicted of, a misdemeanor or felony, excluding minor traffic offenses.

(e) has ever been placed on probation in connection with any criminal offense or a licensing action.

103.5.2 The instructor will demonstrate evidence of knowledge of the subject matter by the following:

103.5.2.1 A minimum of five years active experience in appraising, or

103.5.2.2 Evidence of having completed college or other appropriate courses specific to the topic he proposes to teach, or

103.5.2.3 Evidence of other qualifications of experience, education, or credentials which are acceptable to the Board; and

103.5.2.4 Evidence of having passed an examination designed to test knowledge of the subject matter he proposes to teach.

103.5.3 An applicant to teach the course on USPAP shall conform to all of the above criteria and in addition:

103.5.3.1 The applicant shall be a licensed or state-certified appraiser, and shall have seven years of experience as a full-time appraiser within the past 15 years, and

103.5.3.2 Shall be able to provide evidence of having completed a USPAP course within the last two years, which course and accompanying exam have been approved by the Board.

103.5.4 Upon approval by the Board, an applicant will be issued certification. All certifications expire January 1 of each even numbered year. Conditions of renewal of certification include providing proof of the following:

103.5.4.1 Must have taught at least 20 hours of in-class instruction in a certified course during the preceding two years; and

103.5.4.2 Must have attended a real estate instructor development workshop sponsored or approved by the Division during the preceding two years.

103.5.5 Within 15 calendar days after the occurrence of any of the events listed in Section 103.5.1, an

applicant or instructor shall give written notice to the Division of that event.

#### **R162-103-6. Education Review Committee.**

103.6 A committee may be appointed by the Board to review submissions for education credit for license or certification applicants and also to review submissions for certification of appraiser courses and instructors.

103.6.1 The Education Review Committee shall:

103.6.1.1 Review all applications for adherence to the education credit required for licensure or certification and make recommendations to the Division and the Board for approval or disapproval of the education claimed.

103.6.1.2 Review all submissions requesting certification of appraiser courses and instructors for precertification education purposes and make recommendations to the Division and the Board for approval or disapproval.

103.6.2 The Committee shall be composed of appraisers from the following categories: residential appraisers; commercial appraisers; farm and ranch appraisers; right-of-way appraisers; and ad valorem appraisers.

103.6.2.1 The chairperson of the committee shall be appointed by the Board.

103.6.2.2 Meetings may be called upon the request of the chairperson or upon the written request of a quorum of committee members.

103.6.3 If the review of an application has been performed by the Education Review Committee, and the Board has denied the application based on insufficient education or an inability to meet the certification of education requirements, the applicant may request that the Board review the issue again by making a request in writing to the Board within thirty days after the denial stating specific grounds upon which relief is requested. The Board shall thereafter consider the request and issue a written decision.

#### **R162-103-7. Continuing Education Course Certification.**

103.7 As a condition of renewal, all appraisers will complete the equivalent of 28 classroom hours of appraisal education during the two-year term preceding renewal. The continuing education requirement is for the purpose of maintaining and increasing the appraiser's skill, knowledge and competency in real estate appraising.

103.7.1 Continuing education credit may be granted for courses that meet the following criteria:

(a) the course has been obtained from any of the course providers designated in 103.1.

(b) the course covers appraisal topics as suggested by the AQB.

(c) the length of the educational offering is at least two classroom hours, each classroom hour is defined as 50 minutes out of each 60-minute segment, and the continuing education credit is limited to eight hours per day.

(d) the course meets the requirements for distance learning as outlined in R162-103.3.7.

103.7.2 Real estate appraisal related field trips are acceptable for continuing education credit; however, transit time to or from the field trip location should not be included when awarding credit if instruction does not occur.

103.7.3 Precertification education credit awarded to individuals seeking a different classification than that

held, can also be used to satisfy a continuing education requirement.

103.7.4 Alternative Continuing Education Credit - continuing education credit may be granted for participation, other than as a student, in appraisal educational processes and programs.

103.7.4.1 Credit may be granted on a case by case basis for teaching, program development, authorship of textbooks, or similar activities which are determined by the Board to be equivalent to obtaining continuing education.

103.7.4.2 The Education Review Committee will review claims of equivalent education and also alternative continuing education proposed to be used for continuing education purposes.

103.7.4.3 The Board may award continuing education credit to members of the Education Review Committee, the Experience Review Committee, and the Technical Advisory Panel.

#### **R162-103-8. Administrative Proceedings.**

The Division may deny certification or renewal of certification to any course, school or instructor that does not meet the standards required by this chapter.

#### **References: 61-2b-8.**

**History:** 11002, EMR, 08/01/90; 11300, AMD, 12/17/90; 11664, AMD, 07/12/91; 12472, AMD, see CPR; 12472, CPR, 06/24/92; 13167, AMD, 09/14/92; 15509, AMD, 03/03/94; 15746, AMD, 05/31/94; 18882, AMD, see CPR; 18882, CPR, 07/08/97; 20148, 5YR, 10/21/97; 22002, EMR, 05/03/99; 22062, AMD, 07/16/99; 22768, AMD, 06/01/2000.

#### **R162-104. Experience Requirement.**

R162-104-1. Measuring Experience.

R162-104-2. Maximum Points Per Year.

R162-104-3. Time Allowed for Meeting Experience Requirement.

R162-104-4. Proof of Experience.

R162-104-5. Compliance with USPAP and Licensing Requirements, USPAP Limited Appraisals.

R162-104-6. State-Certified Residential Applicants.

R162-104-7. State-Licensed and State-Certified Applicants.

R162-104-8. Cumulative Points.

R162-104-9. Review or Supervision of Appraisals.

R162-104-10. Condemnation Appraisals.

R162-104-11. Preliminary Valuation Estimates, Comparative Market Analysis, Real Estate Consulting Services, and Other Real Estate Experience.

R162-104-12. Ad Valorem Appraisal and Benchmark Appraisal.

R162-104-13. Experience Participation.

R162-104-14. Unacceptable Experience.

R162-104-15. Verification of Experience.

R162-104-16. Experience Review Committee.

R162-104-17. Special Circumstances.

R162-104-18. Appraisal Experience Points Schedule.

#### **R162-104-1. Measuring Experience.**

104.1.1 Except for those applicants who qualify under Section 104.17, appraisal experience shall be measured in points according to the Appraisal Experience Points Schedule in Section R162-104-18 of this rule and also in time accrued.

104.1.1.1 Experience for state-licensed applicants shall have been accrued in no fewer than 24 months. Experience for the certified residential applicants

shall have been accrued in no fewer than 30 months from the date of registration, and experience for the certified general applicants shall have been accrued in no fewer than 36 months from the date of registration or licensure.

104.1.1.2 Applicants for the state-licensed category shall submit proof of at least 400 points of experience. Applicants for certified residential shall submit proof of at least 500 points of experience, and applicants for certified general shall submit proof of at least 600 points of experience.

#### **R162-104-2. Maximum Points Per Year.**

104.2 All experience points cannot be earned in one 12-month period. For applicants for certification, a maximum of 375 points will be credited for any one 12-month period. For applicants for licensure, a maximum of 300 points will be credited for any one 12-month period.

#### **R162-104-3. Time Allowed for Meeting Experience Requirement.**

104.3 Credit will be given for appraisal experience earned only within five years immediately preceding the licensure or certification application.

#### **R162-104-4. Proof of Experience.**

104.4 The Division shall require the applicant to furnish the following information for each appraisal for which points are claimed: property address or legal description, date of the appraisal, type of property, and any other information deemed appropriate by the Division.

#### **R162-104-5. Compliance with USPAP and Licensing Requirements, USPAP Limited Appraisals.**

104.5 No experience credit will be given for appraisals which were performed in violation of Utah law or the law of another jurisdiction, or the administrative rules adopted by the Division and the Board.

104.5.1 No experience credit will be given for appraisals unless the appraisals were done in compliance with USPAP.

104.5.2 No experience credit toward certification will be given for appraisals if the applicant was not registered or licensed as an appraiser in Utah, or in another state if registration or licensure was required in that state, at the time the appraisal was performed.

104.5.3 For the purposes of this rule, limited appraisals are defined as opinions of value performed under, and resulting from, invoking the departure provision of USPAP, but do not include mass appraisals. Limited appraisals shall be granted 50% of the credit awarded an appraisal which is not a limited appraisal. Limited appraisals where only an exterior inspection of the subject property is performed shall be granted 25% of the credit awarded an appraisal which is not a limited appraisal. Not more than 25% of the total experience required for licensure or certification may be earned from limited appraisals.

#### **R162-104-6. State-Certified Residential Applicants.**

104.6 State-Certified Residential Applicants. Applicants applying for certification as State-Certified Residential Appraisers must document at least 75% of the points submitted from the Residential Experience Points Schedule. No more than 25% of the total points submitted may be from the General Experience Points Schedule.

#### **R162-104-7. State-Licensed and State-Certified Applicants.**

104.7.1 Except for those applicants who qualify under Section 104.17, applicants applying for licensure as State-Licensed Appraisers shall be awarded points from either the Residential Experience Points Schedule or the General Experience Points Schedule for their experience prior to licensure only if the experience claimed was gained in compliance with Section 105.3.

104.7.2 Applicants applying for certification as State-Certified Residential Appraisers must document at least 75% of the points submitted from the Residential Experience Points Schedule. No more than 25% of the total points submitted may be from the General Experience Points Schedule.

104.7.3 Applicants applying for certification as State-Certified General Appraisers may claim points for experience from either the Residential Experience Points Schedule or the General Experience Points Schedule, so long as at least 50% of the total points has been earned from the General Experience Points Schedule.

#### **R162-104-8. Cumulative Points.**

104.8 The cumulative points from instruction of appraisal classes and appraisal textbook and article authorship shall not exceed 50% of the cumulative points submitted.

#### **R162-104-9. Review or Supervision of Appraisals.**

104.9 Review appraisals will be awarded experience credit when the appraiser has performed technical reviews of appraisals prepared by either employees, associates or others, provided the appraiser complied with Uniform Standards of Professional Appraisal Practice Standards Rule 3 when the appraiser was required to comply with the rule. The following points shall be awarded for review or supervision of appraisals:

104.9.1 Review of appraisals which does not include a physical inspection of the property and verification of the data, commonly known as a desk review, shall be worth 20% of the points awarded to the appraisal if a separate written review appraisal report is prepared. A maximum of 100 points may be earned by desk review of appraisals.

104.9.2 Review of appraisals which includes a physical inspection of the property and verification of the data, commonly known as a field review, shall be worth 50% of the points awarded to the appraisal if a separate written review appraisal report is prepared. A maximum of 100 points may be earned by field review of appraisals.

104.9.3 Supervision of appraisers shall be worth 20% of the points awarded to the appraisal. A maximum of 100 points may be earned by supervision of appraisers.

104.9.4 Not more than 50% of the total experience required for certification may be granted under Subsections R162-104-9(104.9.1) through R162-104-9(104.9.3) and R162-104-11(104.11.1) and R162-104-11(104.11.3) combined.

#### **R162-104-10. Condemnation Appraisals.**

104.10 Condemnation appraisals shall be worth an additional 50% of the points normally awarded for the appraisal if the condemnation appraisal included a before and after appraisal because of a partial taking of the property.

**R162-104-11. Preliminary Valuation Estimates, Comparative Market Analysis, Real Estate Consulting Services, and Other Real Estate Experience.**

104.11.1 Preliminary valuation estimates, range of value estimates or similar studies, and other real estate related experience gained by bankers, builders, city planners and managers, or other individuals may be granted credit for up to 50% of the experience required for certification in accordance with R162-104-17 of this rule, so long as the experience demonstrates to the Board that the applicant has the ability to arrive at a fair market value of property and to properly document value conclusions.

104.11.2 Comparative market analysis by real estate licensees may be granted up to 100% experience credit toward certification in accordance with R162-104-17 of this rule, when the analysis is prepared in conformity with USPAP Standards Rules 1 and 2 and the individual can demonstrate to the Board that he is using similar techniques as appraisers to value properties and effectively utilize the appraisal process.

104.11.3 Appraisal analysis, real estate counseling or consulting services, and feasibility analysis/study will be awarded experience credit in accordance with R162-104-17 of this rule for up to 50% of the experience required toward certification so long as the services were performed in accordance with USPAP Standards Rules 4 and 5.

104.11.4 Not more than 50% of the total experience required for certification may be granted under Subsections R162-104-11(104.11.1) and R162-104-11(104.11.3) and R162-104-9(104.9.1) through R162-104-9(104.9.3) combined.

**R162-104-12. Ad Valorem Appraisal and Benchmark Appraisal.**

104.12 Ad valorem appraisal and benchmark appraisal by property type will earn the same number of points as fee appraisal where the individual can demonstrate that he performed highest and best use analysis, developed the model in model specification, or developed adjustments to the model in model calibration, and where the individual can demonstrate the appraisal was performed in accordance with Standards Rule 6 of the Uniform Standards of Professional Appraisal Practice.

**R162-104-13. Experience Participation.**

104.13 An applicant for certification must be able to prove more than 50% participation in the data collection, verification of data, reconciliation, analysis, identification of property and property interests, compliance with USPAP standards and all Advisory Opinions of USPAP, and preparation and development of the appraisal report in order to count the appraisal for experience credit. Experience credit will be granted to only one registered or licensed appraiser per completed appraisal even though more than one may have participated in the development of the appraisal.

**R162-104-14. Unacceptable Experience.**

104.14 An applicant will not receive points toward satisfying the experience requirement for licensure or certification for performing the following:

(a) Appraisals of the value of a business as distinguished from the appraisal of commercial real estate; or

(b) Personal property appraisals.

**R162-104-15. Verification of Experience.**

104.15 The Board, at its discretion, may verify the claimed experience by any of the following methods:

verification with the clients; submission of selected reports to the Board; and field inspection of reports identified by the applicant at the applicant's office during normal business hours.

**R162-104-16. Experience Review Committee.**

104.16 There may be a committee appointed by the Board to review the experience claimed by applicants for licensure or certification.

104.16.1 The Committee shall:

104.16.1.1 Review all applications for adherence to the experience required for licensure or certification;

104.16.1.2 Correspond with applicants concerning submissions, if necessary; and

104.16.1.3 Make recommendations to the Division and the Board for licensure or certification approval or disapproval.

104.16.2 Committee composition. The Committee shall be composed of appraisers from the following categories: residential appraisers; commercial appraisers; farm and ranch appraisers; right-of-way appraisers; and ad valorem appraisers.

104.16.2.1 The chairperson of the committee shall be appointed by the Board.

104.16.2.2 Meetings may be called upon the request of the chairperson or upon the written request of a quorum of committee members.

104.16.3 New Review. If the review of an application has been performed by the Experience Review Committee, and the Board has denied the application based on insufficient experience, the applicant may request that the Board review the issue again by making a written request within thirty days after the denial stating specific grounds upon which relief is requested. The Board shall thereafter consider the request and issue a written decision.

**R162-104-17. Special Circumstances.**

104.17 Applicants having experience in categories other than those shown on the Appraisal Experience Points Schedule, or applicants who believe the Experience Points Schedule does not adequately reflect their experience, or applicants who believe the Experience Points Schedule does not adequately reflect the complexity or time spent on an appraisal, may petition the Board on an individual basis for evaluation and approval of their experience as being substantially equivalent to that required for licensure or certification. Upon a finding that an applicant's experience is substantially equivalent to that required for licensure or certification, the Board may waive experience points, give an applicant credit for months of experience, or both.

104.17.1 Fulltime elected county assessors and any person performing an appraisal for the purposes of establishing the fair market value of real estate for the assessment roll may, as an alternative to using the Appraisal Experience Points Schedule, be awarded 200 points for every 12 months of service, provided that they have experience in at least three of the following categories and no more than one-third of their experience comes from any one of the following categories:

104.17.1.1 Property description/identification;

104.17.1.2 Highest and best use analysis;

104.17.1.3 Land value estimates;

104.17.1.4 Cost approach;

104.17.1.5 Sales comparison;

104.17.1.6 Income capitalization approach.

104.17.2 Fulltime elected county assessors and any person performing an appraisal for the purposes of

establishing the fair market value of real estate for the assessment roll are not subject to the limitations in Section 105.3.

104.17.3 Fulltime investigators with the Division who perform appraisal investigations may be awarded 200 points for every 18 months of service. They are not subject to the limitations in Section 105.3.

#### R162-104-18. Appraisal Experience Points Schedule.

104.18 Points shall be awarded as follows:

104.18.1 Residential Experience Points Schedule. The following points shall be awarded to form appraisals. Three points may be added to the points shown if the appraisal was a narrative appraisal instead of a form appraisal.

TABLE 1

(a) One unit dwelling, including a site	1 point
(b) Multiple one-unit dwellings in the same subdivision or condominium project which are substantially similar 1-25 dwellings	1 point per dwelling up to a maximum of 6 points
Over 25 dwellings	A total of 10 points
(c) Two- to four-unit dwelling	4 points
(d) Employee Relocation Counsel reports completed on currently accepted Employee Relocation Counsel form	2 points
(e) Residential lot, 1-4 family	1 point
(f) Multiple lots in the same subdivision which are substantially similar 1-25 lots	1 point per lot up to a maximum of 6 points
Over 25 lots	A total of 10 points
(g) Small parcel up to 5 acres	1 point
(h) Vacant land, 20-500 acres, maximum 50 points may be awarded for appraisal of vacant land	4 points
(i) Recreational, farm, or timber acreage suitable for a house site up to 10 acres	2 points
Over 10 acres	3 points
(j) All other unusual structures or acreages, which are much larger or more complex than typical properties	1-6 points as determined by the Board
(k) Residential appraisal textbook authorship, not to exceed 20 points per year	As determined by the Board
(l) Residential appraisal articles in journals of approved national appraisal organizations, not to exceed 20 points per year	10 points
(m) Instructing an approved residential course of 20 classroom hours or more	10 points

104.18.2 General Experience Points Schedule. All appraisal reports claimed must be narrative appraisal reports.

TABLE 2

(a) Apartments, 5-100 units	8 points
Over 100 units	10 points
(b) Hotel or motels, 50 units or less	6 points
51-150 units	8 points
Over 150 units	10 points
(c) Nursing home, rest home, care facilities, Fewer than 80 beds	8 points
Over 80 beds	10 points
(d) Industrial or warehouse building, Fewer than 20,000 square feet	6 points
Over 20,000 square feet, single tenant	8 points
Over 20,000 square feet, multiple tenants	10 points
(e) Office buildings	
Fewer than 10,000 square feet	6 points
Over 10,000 square feet, single tenant	8 points
Over 10,000 square feet, multiple tenants	10 points
(f) Entire condominium projects,	

using income approach to value	
5- to 30-unit project	6 points
31- or more-unit project	10 points
(g) Retail buildings	
Fewer than 10,000 square feet	6 points
More than 10,000 square feet, single tenant	8 points
More than 10,000 square feet, multiple tenants	10 points
(h) Commercial or multiple family use acreage which is nonresidential	
Fewer than 10 acres	4 points
100 acres or more	6 points
100 acres or more, income approach to value	10 points
(i) All other unusual structures or assignments which are much larger or more complex than the properties described in (a) to (h) herein.	1 to 20 points as determined by Board
(j) Instructing an approved general appraisal course of 20 classroom hours or more, not to exceed 20 points per year	10 points
(k) Textbook authorship in general appraisal topics, not to exceed 20 points per year	As determined by Board
(l) General field journal articles in journals of approved national appraisal organizations, not to exceed 20 points per year	10 points
(m) Entire subdivisions or Planned Unit Developments (PUDs)	
1- to 25-unit subdivision or PUD	6 points
Over 25-unit subdivision or PUD	10 points
(n) Feasibility or market analysis, maximum 100 points	1 to 20 points as determined by Board
Ad Valorem appraisals	
(o) Development and implementation of multiple regression model - land valuation guide, up to 5000 parcels	20 points
For each additional 5000 parcels, add 1 point	
(p) Depreciation study and analysis	20 points
(q) Sales ratio study and implementation - Physical inspection and review, maximum 50 points	10 points
(r) Development of standards of practice for assessment administration and writing of those guidelines, maximum 40 points	10-20 points as determined by Board
(s) State-assessed property - gravel pits, mines, utilities	1-20 points as determined by Board
Farm and Ranch appraisals	Form      Narrative
(t) Irrigated cropland, pasture other than rangeland, 1 to 10 acres	2 pts.      3 pts.
11-50 acres	2.5 pts.      4 pts.
51-200 acres	3 pts.      5 pts.
201-1000 acres	5 pts.      8 pts.
More than 1000 acres	8 pts.      10 pts.
(u) Dry farm, 1 to 1000 acres	3 pts.      5 pts.
More than 1000 acres	4 pts.      8 pts.
(v) Improvements on properties other than a rural residence, maximum 2 points:	
Dwelling	1 pt.      1 pt.
Sheds	0.5 pt.      0.5 pt.
(w) Cattle ranches	
0-200 head	3 pts.      4 pts.
201-500 head	5 pts.      6 pts.
501-1000 head	6 pts.      8 pts.
More than 1000 head	8 pts.      10 pts.
(x) Sheep ranches	
0-2000 head	5 pts.      6 pts.
More than 2000 head	7 pts.      9 pts.
(y) Dairies, includes all improvements except a dwelling	
1-100 head	4 pts.      5 pts.
101-300 head	5 pts.      6 pts.
More than 300 head	6 pts.      7 pts.
(z) Orchards	
5-50 acres	6 pts.      8 pts.
More than 50 acres	8 pts.      10 pts.
(aa) Rangeland/timber	
0-640 acres	4 pts.      5 pts.
More than 640 acres	6 pts.      7 pts.
(bb) Poultry	
0-100,000 birds	6 pts.      8 pts.
More than 100,000 birds	8 pts.      10 pts.
(cc) Mink	
0-5000 cages	6 pts.      7 pts.
More than 5000 cages	8 pts.      10 pts.
(dd) Fish farms	8 pts.      10 pts.
(ee) Hog farms	8 pts.      10 pts.
(ff) Separate grazing privileges or permits	4 pts.      5 pts.

104.18.2.1 Appraisals on commercial or multifamily form reports shall be worth 75% of the points normally awarded for the appraisal.

**References:** 61-2b-1 through 61-2b-40.

**History:** 11539, NEW, 03/04/91; 11665, AMD, 05/15/91; 14392, AMD, 06/01/93; 15077, AMD, 12/15/93; 15510, NSC, 03/01/94; 17428, AMD, 01/25/96; 17546, AMD, 03/05/96; 18100, AMD, 11/01/96; 18886, 5YR, 04/01/97; 18883, AMD, 05/16/97; 22003, EMR, 05/03/99; 22063, AMD, 07/16/99; 22769, AMD, 06/01/2000.

## R162-105. Scope of Authority.

### R162-105-1. Scope of Authority.

#### R162-105-1. Scope of Authority.

105.1 Transaction value. "Transaction value" means:

105.1.1 For loans or other extensions of credit, the amount of the loan or extension of credit;

105.1.2 For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and

105.1.3 For the pooling of loans or interests in real property for resale or purchase, the amount of the loan or market value of the real property calculated with respect to each such loan or interest in real property.

105.2 State-Licensed Appraisers. In federally-related transactions, the Utah Real Estate Appraiser Licensing Act and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and related federal regulations allow State-Licensed Appraisers to perform the appraisal of non-complex one to four residential units having a transaction value of less than \$250,000.

105.2.1 Subject to the transaction value limits in Section 105.2, State-Licensed Appraisers may also perform appraisals in federally-related transactions of vacant or unimproved land that is utilized for one to four family purposes, or for which the highest and best use is 1-4 family purposes, so long as net income capitalization analysis is not required by the terms of the assignment.

105.2.2 State-Licensed Appraisers may not perform appraisals of subdivisions in federally-related transactions for which a development analysis/appraisal is necessary or for which discounted cash flow analysis is required by the terms of the assignment.

#### 105.3 Unclassified Individuals.

105.3.1 Unclassified individuals who have not yet accumulated 100 experience points and who have not successfully completed the education required for licensure may perform the following duties under the direct supervision of a state-licensed or state-certified appraiser: typing an appraiser's research notes; typing an appraisal report; accompanying an appraiser on an inspection visit to a property; assisting an appraiser in measuring a property; taking photographs of specific properties selected and inspected by the appraiser; performing routine calculations; and obtaining copies of assessment records, deeds, maps, and data from real property data bases relating to properties selected by the appraiser.

105.3.1.1 The unclassified individual may accumulate the first 100 experience points with each duty listed in the following table being worth 20% of the total points awarded from the Appraisal Experience

Points Schedule under Section 104-18.1. or 104-18.2. not to exceed the maximum number of points awarded for each property. Applicants must have experience in at least five of the following categories and no more than one-third of the experience can come from any one of the following categories.

(a) type an appraiser's research notes - 20% of total points

(b) type an appraisal report - 20% of total points

(c) accompany an appraiser on an inspection visit - 20% of total points

(d) assist an appraiser in measuring property - 20% of total points

(e) take photographs of specific properties selected and inspected by the appraiser - 20% of total points

(f) perform routine calculations - 20% of total points

(g) obtain copies of assessment records, deeds, maps and data from real property databases relating to properties selected by the supervising appraiser - 20% of total points

105.3.1.2. Unclassified individuals who have not yet accumulated 100 experience points and who have not successfully completed the education required for licensure may not participate in: selecting comparables for an appraisal assignment; making adjustments to comparables; drafting an appraisal report; and, except when working in the presence of a state-licensed or state-certified appraiser, inspecting a property that is the subject of an appraisal or that may be used as a comparable in an appraisal, or measuring a property.

105.3.2. Unclassified individuals who have accumulated 100 experience points and have successfully completed at least 30 hours of the education required for licensure may act in the capacity of an appraisal "trainee" under the direct supervision of a state-licensed or state-certified appraiser. A "trainee" is permitted to have more than one supervising appraiser.

105.3.2.1. An appraiser "trainee" may, under the direct supervision of a state-licensed or state-certified appraiser, participate in selecting comparables for an appraisal assignment, participate in making adjustments to comparables, draft appraisal reports, and when working in the presence of a state-licensed or state-certified appraiser, inspect a property that is the subject of an appraisal or that may be used as a comparable in an appraisal, and measure a property.

105.3.2.2. The unclassified individual who is a "trainee" may accumulate the experience points with each duty listed in the following table being worth 33.3% of the total points awarded from the Appraisal Experience Points Schedule under Section 104-18.1. or 104-18.2. not to exceed the maximum number of points awarded for each property. "Trainee" experience must be earned in at least three of the following categories and no more than one-third of their experience can come from any one of the following categories.

(a) participate in selecting comparables for an appraisal assignment - 33.3% of total points

(b) participate in making adjustments to comparables - 33.3% of total points

(c) draft appraisal reports - 33.3% of total points

(d) when working in the presence of a state-licensed or state-certified appraiser, inspect a property that is the subject of an appraisal or that may be used as a comparable in an appraisal, and measure the property - 33.3% of total points

105.3.3. All experience points cannot be earned in one 12-month period. For applicants for licensure, a maximum of 300 points will be credited for any one



12-month period. Credit will be given for appraisal experience earned only within five years immediately preceding the licensure or certification application. Applicants who believe the Experience Points Schedule does not adequately reflect their experience may refer to Section 104-17.

105.3.4. All unclassified individuals are prohibited from signing an appraisal report or discussing an appraisal assignment with anyone other than the appraiser responsible for the assignment, state enforcement agencies and such third parties as may be authorized by due process of law, or a duly authorized professional peer review committee.

105.3.5. A classified appraiser who supervises an unclassified individual shall be responsible for the training and direct supervision of the unclassified individual.

105.3.5.1 Direct supervision shall consist of critical observation and direction of all aspects of the appraisal process and accepting full responsibility for the appraisal and the contents of the appraisal report.

105.3.5.2 A classified appraiser shall require the unclassified appraiser to maintain a log in a form satisfactory to the Board which shall contain, at a minimum, the following information for each appraisal.

- (a) Type of property;
- (b) Address of appraised property;
- (c) Description of work performed;
- (d) Number of work hours;
- (e) Signature and state license/certification number of the supervising appraiser.

105.3.6. The unclassified individual shall maintain a separate appraisal log for each supervising appraiser.

#### 105.4. Term of Revocation or Surrender.

105.4.1 Unless otherwise ordered by the Board, any appraiser whose appraiser certification, license, or registration has been revoked or suspended by the Board, or who has surrendered a certification, license, or registration as a result of an investigation by the Division, may not serve as an unclassified appraiser for a period of five years after the date of the revocation or surrender, nor may a licensed or certified appraiser employ or supervise him during that period in the activities permitted unclassified persons.

#### References: 61-2b.

**History:** 22004, EMR, 05/03/99; 22064, NEW, 07/16/99; 22770; AMD, 06/01/2000; 23175, AMD, 11/15/2000.

**Repeals.** — Former R162-105. 18884, REP, 05/16/97.

### R162-106. Professional Conduct.

R162-106-1. Uniform Standards.

R162-106-2. Use of Terms.

R162-106-3. Signatures, Size and Use of Seal.

R162-106-4. Testimony by an Appraiser.

R162-106-5. Failure to Respond to Investigation.

R162-106-6. Recordkeeping Requirements.

#### R162-106-1. Uniform Standards.

106.1. As required by the Appraisal Foundation in accordance with Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), all licensees must comply with the edition of the Uniform Standards of Professional Appraisal Practice (USPAP) currently approved by the Board.

Information on which version of USPAP is currently approved by the Board may be obtained from the division. All persons registered, licensed or certified under this chapter must also observe the Advisory Opinions of USPAP. Copies of USPAP may be obtained from the Appraisal Foundation, 1029 Vermont Avenue N.W., Suite 900, Washington, D.C. 20005. Registered, licensed and certified appraisers and candidates for registration, licensure or certification may obtain copies from the division.

#### R162-106-2. Use of Terms.

106.2. The terms "State-Certified Residential Appraiser," "State-Certified General Appraiser," "State-Licensed Appraiser" and "State-Registered Appraiser" shall not be abbreviated or reduced to a letter or group of letters. If these terms are used on letterhead or in advertising, the appraiser's certificate number, license number or registration number must follow his name.

#### R162-106-3. Signatures, Size and Use of Seal.

##### 106.3.1. State-Certified Appraiser's Seal.

106.3.1.1. When signing a certified appraisal report, State-Certified General Appraisers and State-Certified Residential Appraisers shall place on at least the certification page of the appraisal report, immediately below the appraiser's signature, the seal required by Section 61-2b-17(3)(e).

106.3.1.2. The seal to be affixed on reports prepared by state-certified appraisers shall contain the words "Utah State-Certified Residential Appraiser" or "Utah State-Certified General Appraiser" along with the appraiser's certificate number and expiration date. The zeros preceding the certificate number may be deleted. The size of the seal, rectangular in shape, shall be no larger than two and seven-eighths inches long and five-eighths of an inch high including the border. An example of the seal shall be made available on request at the Division offices.

106.3.1.3. The seal may be reproduced as a stamp with ink that can be copied, or may be inserted by computer in an appraisal report at the appropriate place.

106.3.2. State-Registered and State-Licensed Appraisers. State-registered appraisers and State-Licensed appraisers may not place a seal on an appraisal report or use a seal in any other manner likely to create the impression that the appraiser is a state-certified appraiser.

106.3.2.1. If a State-Registered Appraiser or a State-Licensed Appraiser prepares an appraisal report which exceeds the dollar amount permitted under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and related federal regulations, the appraiser shall include after the appraiser's signature the words, "This appraisal does not qualify for federally related transactions."

106.3.2.1.1. This requirement does not apply if the State-Registered Appraiser or State-Licensed Appraiser has prepared the report under the direct supervision of a state-certified appraiser and the state-certified appraiser has signed the appraisal report taking responsibility for the report.

##### 106.3.3. Signatures.

106.3.3.1. Signature stamps Appraisers may not affix their signatures to appraisal reports by means of a signature stamp.

106.3.3.2. Appraisers may not affix their signatures to blank or partially completed appraisal reports

which will be filled in later by anyone other than the appraiser who has signed the reports.

106.3.3.3. If it is necessary for an appraiser to delegate authority to another individual to sign the appraiser's signature on an appraisal report, the other individual may sign the report for the appraiser only if: a) the report explicitly discloses that the other individual has been authorized to sign the report for the appraiser; b) the permission must have been granted in writing and limited to a specific property address; c) a copy of the written permission to sign must be attached to the report; and d) the appraiser who signs the other's signature must write the word "by" followed by his own name after the other's signature.

106.3.3.4. Digital signatures. A digital signature may be used in place of a handwritten signature only if: a) the software program which generates the digital signature has a security feature; and b) the appraiser ensures that his signature is protected and that no one other than the appraiser has control of that signature.

#### **R162-106-4. Testimony by an Appraiser.**

106.4. Testimony. An appraiser who testifies as to an appraisal opinion in a deposition or an affidavit, or before any court, public body, or hearing officer, shall prepare a written appraisal report or a file memorandum prior to giving such testimony.

106.4.1. File memoranda. For the purpose of this rule, a file memorandum shall include work sheets, data sheets, the reasoning and conclusions upon which the testimony is based, and other sufficient information to demonstrate substantial compliance with USPAP Standards Rule 2-2, or in the case of mass appraisal, Standards Rule 6-7.

#### **R162-106-5. Failure to Respond to Investigation.**

106.5. When the Division notifies an appraiser or registered expert witness of a complaint, the notified individual must respond to the complaint in writing within ten business days of the notice from the Division. Failure to respond within the required time period to a notice of complaint, a subpoena, or any written request for information from the Division shall be considered a violation of these rules and separate grounds for disciplinary action against the appraiser or registered expert witness.

#### **R162-106-6. Recordkeeping Requirements.**

106.6. The true copy of an appraisal report which an appraiser is required by Section 61-2b-34(1) to retain shall be a photocopy or other exact copy of the report as it was provided to the client, including the appraiser's signature.

##### **References: 61-2b-27.**

**History:** 11573, NEW, 04/01/91; 12314, AMD, 12/31/91; 12727, AMD, 06/24/92; 14394, AMD, 06/01/93; 15512, NSC, 03/01/94; 15652, AMD, 04/14/94; 16008, AMD, 08/31/94; 16158, AMD, 10/17/94; 17547, AMD, 03/05/96; 18101, AMD, 11/01/96; 18317, AMD, 01/01/97; 18887, 5YR, 04/01/97; 18885, AMD, see CPR; 18885, CPR, 07/08/97; 21151, AMD, 07/14/98; 22005, EMR, 05/03/99; 22065, AMD, 07/16/99; 22626, AMD, 03/20/2000; 23268, AMD, 12/18/2000.

#### **R162-107. Unprofessional Conduct.**

##### **R162-107-1. Unprofessional Conduct.**

#### **R162-107-1. Unprofessional Conduct.**

107.1 Unprofessional conduct includes the following specific acts or omissions:

107.1.1 Violating or disregarding a disciplinary order of the Utah Appraiser Licensing and Certification Board or the division;

107.1.2 Signing an appraisal report containing a statement indicating that an appraiser has inspected a property if the appraiser has not inspected the property;

107.1.3 Signing an appraisal report as the supervising appraiser without having given adequate supervision to the registered appraiser or the unclassified assistant;

107.1.4 Allowing an appraiser in his employ, or an appraiser whom he is otherwise responsible to supervise, to:

(a) exceed the authority of the subordinate appraiser's classification;

(b) engage in conduct which is a violation of Title 61, Chapter 2b.

107.1.5 Allowing a non-appraiser to:

(a) exceed the authority granted to an unclassified person by these rules;

(b) engage in conduct which would be a violation of Title 61, Chapter 2b if done by an appraiser; or

107.1.6 Splitting appraisal fees with an unclassified person, except that an unclassified person may be paid a reasonable salary or a reasonable hourly rate for lawful services actually performed in connection with appraisals.

107.2 The Board may appoint members of the appraisal industry to serve as a Technical Advisory Panel to provide advice to the Division concerning technical appraisal issues and conduct constituting unprofessional conduct.

##### **References: 61-2b-8.**

**History:** 20625, NEW, 03/04/98; 22006, EMR, 05/03/99; 22066, AMD, 07/16/99; 22771, AMD, 06/01/2000.

#### **R162-109. Administrative Proceedings.**

R162-109-1. Formal Adjudicative Proceedings.

R162-109-2. Informal Adjudicative Proceedings.

R162-109-3. Hearings Not Required.

R162-109-4. Hearings Permitted.

R162-109-5. Procedures for Hearings in Informal Adjudicative Proceedings.

#### **R162-109-1. Formal Adjudicative Proceedings.**

109.1. Any adjudicative proceeding as to the following matters shall be conducted on a formal basis:

109.1.1. the revocation, suspension, or placing on probation of an appraiser registration, license, certification, or temporary permit;

109.1.2. the revocation, suspension, or placing on probation of certification of appraisal courses, schools, or instructors;

109.1.3. the imposition of a fine or a remedial education requirement against the holder of a registration, license, certificate or temporary permit;

109.1.4. the imposition of a fine or a remedial education requirement against a certified appraisal school or instructor;

109.1.5. any proceedings conducted subsequent to the issuance of a cease and desist order or other emergency order.

**R162-109-2. Informal Adjudicative Proceedings.**

109.2.1. All adjudicative proceedings as to any other matters not specifically designated as formal adjudicative proceedings shall be conducted as informal adjudicative proceedings.

109.2.2. A hearing will be held in an informal adjudicative proceeding only if required or permitted by the Appraiser Licensing and Certification Act or these rules.

109.2.3. A party is not required to file a written answer to a notice of agency action from the Division in an informal adjudicative proceeding.

109.2.4. All proceedings on original applications for licensure or certification or renewal applications for registration, licensure or certification as an appraiser, or for certification of appraisal courses, schools, or instructors, and all proceedings on applications for a temporary permit or registration as an expert witness will be conducted as informal adjudicative proceedings.

109.2.5. All application forms which shall be filled out and submitted to the Division for registration, licensure or certification as an appraiser, or for certification of courses, schools, or instructors, and all applications for a temporary permit shall be deemed a request for agency action pursuant to the Utah Administrative Procedures Act, Section 63-46b-1, et seq.

109.2.5.1. Upon receipt of an application, the Division shall:

(a) issue and mail a registration, license, certification, or temporary permit, which shall be deemed notification that the application is granted;

(b) notify the applicant that the application is incomplete and that further information is needed;

(c) notify the applicant that a hearing shall be scheduled before the Utah Appraiser Licensing and Certification Board for the purpose of determining the applicant's fitness for registration, licensure, or certification; or

(d) notify the applicant that the application is denied, and, if the proceeding is one in which a hearing is permitted, that he may request a hearing to challenge the denial.

**109.2.6. Other Requests for Agency Action**

109.2.6.1. All other requests for agency action shall be in writing and signed by the requestor, and shall contain the following:

(a) the names and addresses of all persons to whom a copy of the request for agency action is being sent;

(b) the agency's file number or other reference number, if known;

(c) the date of mailing of the request for agency action;

(d) a statement of the legal authority and jurisdiction under which the agency action is requested, if known;

(e) a statement of the relief or action sought from the Division; and

(f) a statement of the facts and reasons forming the basis for relief or agency action.

109.2.6.2. Upon receipt of a request for agency action other than an application for registration, licensure or certification, the Division shall:

(a) notify the requestor in writing that the request is granted;

(b) notify the requestor that the request is incomplete and that further information is needed before the Division is able to make a determination on the request;

(c) notify the requestor that the Division does not have the legal authority or jurisdiction to grant the relief requested or the action sought; or

(d) notify the requestor that the request is denied, and, if the proceeding is one in which a hearing is permitted, that he may request a hearing to challenge the denial.

109.2.6.3. A complaint against an appraiser, a registered expert witness, or the holder of a temporary permit requesting that the Division commence an investigation or a disciplinary action is not a request for agency action.

**R162-109-3. Hearings Not Required.**

109.3. A hearing is not required and will not be held in the following informal adjudicative proceedings:

109.3.1. The issuance, renewal or reinstatement of an appraiser registration, license or certification;

109.3.2. The issuance or renewal of an appraisal course, school, or instructor certification;

109.3.3. The issuance of any interpretation of statute, rule or order, or the issuance of any written opinion or declaratory order determining the applicability of a statute, rule or order, when enforcement or implementation of the statute, rule or order lies within the jurisdiction of the Division; or

109.3.4. The denial of renewal or reinstatement of an appraiser registration, license or certification for failure to complete any continuing education required by Section 61-2b-40.

**R162-109-4. Hearings Permitted.**

109.4.1. In the following informal adjudicative proceedings, a hearing will be held only if requested in writing by a party within 30 days from the date a notice of agency action or the Division's response to a request for agency action is mailed:

109.4.1.1. The denial of an application for certification as an instructor on the grounds that his attestation to upstanding moral character is false;

109.4.1.2. The denial of an application for an initial appraiser license or certification due to insufficient education or experience, as determined by the appropriate review committee appointed by the Appraiser Licensing and Certification Board; or

109.4.1.3 The denial of an application for a temporary permit.

109.4.2. A request by a party for a hearing shall include the grounds upon which relief is requested.

109.4.3. All hearings permitted by this rule will be before the Utah Appraiser Licensing and Certification Board.

**R162-109-5. Procedures for Hearings in Informal Adjudicative Proceedings.**

109.5.1. Notice of hearing. Upon the scheduling of a license application hearing by the Division or upon receipt of a timely request for a hearing where other hearings are permitted, the Division shall mail written notice of the date, time, and place scheduled for the hearing at least ten days prior to the hearing.

109.5.2. Discovery is prohibited, but the Division may issue subpoenas or other orders to compel production of necessary evidence. All parties shall have access to the Division's files and to all materials and information gathered in any investigation to the extent permitted by law.

109.5.3. Intervention is prohibited.

109.5.4. Hearings shall be open to all parties, except that a hearing on an applicant's fitness for registration, licensure or certification shall be conducted in a closed session which is not open to the public. The parties named in the Notice of Agency Action or the Request for Agency Action may be represented by counsel and shall have the opportunity to testify,

present witnesses and other evidence, and comment on the issues.

109.5.5. Within a reasonable time after the hearing, the presiding officer shall cause to be issued and mailed to the parties a signed order in writing based on the facts appearing in the agency's files and on the facts presented in evidence at the hearing. The order shall state the decision and the reasons therefor and a notice of the right of administrative review and judicial review available to the parties including applicable time limits.

109.5.6. The Division may, but shall not be required to, record the hearing. If a record has been made, any party, at his own expense, may have a reporter approved by the Division prepare a transcript from the Division's record of the proceedings.

**References:** 61-2b-30.

**History:** 13168, NEW, 09/14/92; 15513, NSC, 03/01/94; 17429, AMD, 01/25/96; 19888, 5YR, 09/12/97; 22007, EMR, 05/03/99; 22067, AMD, 07/16/99; 23259, NSC, 11/01/2000.

## **R164. Securities.**

- R164-1. Fraudulent Practices.
- R164-2. Investment Adviser - Unlawful Acts.
- R164-4. Licensing Requirements.
- R164-5. Broker-Dealer and Investment Adviser Books and Records.
- R164-6. Denial, Suspension or Revocation of a License.
- R164-9. Registration by Coordination.
- R164-10. Registration by Qualification.
- R164-11. Registration Statement.
- R164-12. Sales Commission.
- R164-13. Definitions.
- R164-14. Exemptions.
- R164-15. Federal Covered Securities.
- R164-18. Procedures.
- R164-25. Record of Registration.
- R164-26. Consent to Service of Process.

### **R164-1. Fraudulent Practices.**

R164-1-3. Fraudulent Practices of Broker-Dealers, Broker-Dealer Agents, and Issuer-Agents.

#### **R164-1-3. Fraudulent Practices of Broker-Dealers, Broker-Dealer Agents, and Issuer-Agents.**

(A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Subsection 61-1-1(3) and Section 61-1-24.

(2) This rule identifies practices by broker-dealers, broker-dealer agents, or issuer-agents which are generally associated with schemes to manipulate the securities markets.

(3) A broker-dealer, broker-dealer agent, or issuer-agent who engages in one or more of the practices listed below will be deemed to have engaged in an "act, practice or course of business which operates or would operate as a fraud" as used in Subsection 61-1-1(3).

(4) This rule is not intended to be all-inclusive. Thus, acts or practices not listed may also be deemed fraudulent.

(5) This rule does not preclude application of the anti-fraud provisions of Subsection 61-1-1(3) against

anyone for practices similar in nature to the practices listed in Subsection (C).

(B) Definitions used in the rule.

(1) "Customer" means potential, current, or past clients.

(2) "Designated security" means any equity security other than a security

(2)(a) listed, or approved for listing upon notice of issuance, on a national securities exchange and makes transaction reports available as required under SEC Rule 11Aa3-1, Dissemination of transaction reports and last sale data with respect to transactions in reported securities, 17 CFR 240.11Aa3-1 (1992), which is adopted and incorporated by reference and available from the SEC;

(2)(b) listed, or approved for listing upon notice of issuance, on the NASDAQ system;

(2)(c) issued by an investment company registered under the Investment Company Act of 1940;

(2)(d) that is a put option or call option issued by The Options Clearing Corporation; or

(2)(e) whose issuer has net tangible assets in excess of \$4,000,000 as demonstrated by financial statements, dated less than fifteen months previous to the date of the transaction with the person, that you have reviewed and have a reasonable basis to believe are true and complete, and

(2)(e)(i) in the event the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with SEC Rule 2-02, Accountant's reports, 17 CFR 210.2-02 (1992), which is adopted and incorporated by reference and available from the SEC; or

(2)(e)(ii) in the event the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the Commission; furnished to the Commission pursuant to SEC Rule 12g3-2(b), Exemptions for American depository receipts and certain foreign securities, 17 CFR 240.12g3-2 (1992), which is adopted and incorporated by reference and available from the SEC; or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

(3) "Exempt transactions" under subparagraph (C)(1)(h) means:

(3)(a) transactions in which the price of the designated security is five dollars or more, exclusive of costs or charges; provided, however, that if the designated security is a unit composed of one or more securities, the unit price divided by the number of components of the unit other than warrants, options, rights, or similar securities must be five dollars or more, and any component of the unit that is a warrant, option, right, or similar securities, or a convertible security must have an exercise price or conversion price of five dollars or more;

(3)(b) transactions that are not recommended by you or your agent;

(3)(c) transactions by you:

(3)(c)(i) where commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the immediately preceding three months, and during eleven or more of the preceding twelve months, did not exceed five percent of your total commissions, commission-equivalents,

Tab 8

1978 WL 25792 (Utah A.G.)

Office of the Attorney General

State of Utah

August 9, 1978

Mr. Eugene S. Lambert  
Executive Director

Dear Mr. Lambert:

This is in response to your letter of July 12, 1978, in which you requested an opinion as to certain questions posed by Mr. Joseph Healy, a real estate broker, that arise from the following facts:

A broker is requested to find a sand and gravel property to purchase. A suitable property is located and negotiations for its sale takes place. Another broker lists the property for sale as 182 acres with improvements. The purchaser finally decides to purchase all of the stock of the corporation owning the sand and gravel property. The offer to purchase the stock includes a 6% commission for both the selling and purchasing brokers. Mr. Healy asks four questions.

QUESTION 1: Is the transaction a real estate transaction, a sale of business opportunity, a securities transaction, or none of the above?

ANSWER: Of course, a sale of stock in a corporation is a securities transaction. But, there is the possibility that this transaction also be considered a 'business opportunity' within the definition of that term as found in Section 61-2-2, Utah Code Annotated 1953, of the Real Estate Broker's Licensing Act. A 'business opportunity'

means an existing business including good will and is encompassed by the term 'real estate.' A person engaged in business brokering is subject to the real estate license laws. But the statute does not specify what type of sale of a business opportunity would be so subject, whether the assets of a business must be sold or merely a controlling share in a corporation. This is a significant distinction because someone could possibly circumvent the real estate licensing requirements by limiting himself to brokering only transactions involving sales of controlling shares in a corporation. It is our opinion that a Utah court would probably find a sale of a controlling share of stock in a corporation too far removed in nature from a real estate transaction to fall within the term 'real estate' as defined by Section 61-2-2. There are too many variables involved in determining what constitutes a sale of control of a corporation. Less than 51% may be sufficient to control for certain purposes. To avoid any disputes which may arise from the nebulous definition of the term 'control' it would be best to adopt a mechanical rule to the effect that only sales of assets of a business qualify as a sale of a 'business opportunity' under the statute.

QUESTION 2: Is a securities license required for the transaction?

ANSWER: The answer is no. Section 61-1-13, Utah Code Annotated 1953, defines a securities broker-dealer as 'any person engaged in the business of effecting transactions in securities for the account of others or for his own account.' There is no need to discuss at length the meaning of 'in the business' because it is obvious that the brokers here are not in the securities business. They are real estate brokers. This securities transaction is an isolated case in their career, not a part of normal business activity. If, however, a person is engaged in business brokering by means of transferring controlling shares of a corporation, then it appears he would be subject to the licensing laws as applicable to a broker-dealer in securities. This, parenthetically, is another reason why 'business opportunity' should be interpreted to mean sale of assets of a business because, although a person

engaged in brokering controlling shares of corporations would not be subject to the real estate licensing laws, he would, as noted above, have to obtain a broker-dealer's license to deal in securities transactions and thus could not escape regulatory control.

**\*2 QUESTION 3:** Can a real estate broker legally claim a commission as the offer to purchase contemplates?

ANSWER: Yes, there is nothing in Utah law which would prevent the broker from being compensated for his services in finding a suitable property to purchase, even though an actual transfer of that property never took place. There is nothing in Utah law which suggests that a real estate broker may only be compensated when his services culminate in a transfer of an interest in real property.

If your question implies the further inquiry as to what would be the broker's legal rights if the purchaser or seller refused to pay a commission, the answer is that it depends on the wording and intent of the broker's contract with his principal. With respect to the general contract terms, the production of a ready, willing and able customer would suffice as fulfillment of the broker's part of the bargain and would give rise to the principal's obligation to pay a commission. Furthermore, fairness and equity hold with the broker in this situation, and would influence a judge's interpretation of the contract. However, if the contract's wording indicates a specific condition of a transfer of real property upon which the broker's commission is contingent, then the broker in this case may not be entitled to a commission. The broker should protect himself by drafting the contract according to these possibilities.

**QUESTION 4:** Must the selling broker process the sale through the real estate company?

ANSWER: The answer is no, he cannot, because it is not a real estate transaction.

Very truly yours,  
Leon A. Halgren  
Assistant Attorney General

1978 WL 25792 (Utah A.G.)  
END OF DOCUMENT

Tab 9



**H. B. No. 284**

Effective April 29, 1985

(Laws of Utah 1985, Chapter 162)

**REAL ESTATE AMENDMENTS**

By Rep. Richard J. Bradford

AN ACT RELATING TO THE SECURITIES COMMISSION; REVISING THE REAL ESTATE BROKERS CHAPTER; REDEFINING TERMS; REQUIRING THE DIVISION OF REAL ESTATE AND THE REAL ESTATE COMMISSION TO WORK IN CONCURRENCE WITH EACH OTHER; CHANGING THE APPLICATION REQUIREMENTS; REVISING NONRESIDENT LICENSURE REQUIREMENTS; CHANGING THE FORM OF THE LICENSE AND RENEWAL DATE; GIVING THE DIVISION SUBPOENA POWER IN INVESTIGATIONS; ADDING TO PROHIBITED CONDUCT; CHANGING SOME APPEAL PROCEDURES; PROVIDING FINES TO BE DEPOSITED IN THE REAL ESTATE RECOVERY FUND; REQUIRING FORM APPROVAL; PROVIDING FOR LICENSE FEE RENEWAL; LIMITING THE AMOUNT RECOVERABLE FROM THE REAL ESTATE RECOVERY FUND; AND PROVIDING FOR REVOCATION OF LICENSURE.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

**AMENDS:**

- 61-2-1, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-2, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-3, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-4, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-5, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-5.5, AS ENACTED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-6, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-7, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-8, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-9, AS LAST AMENDED BY CHAPTER 15, LAWS OF UTAH 1984, SECOND SPECIAL SESSION, WHICH TAKES EFFECT JULY 1, 1985
- 61-2-23, AS ENACTED BY CHAPTER 254, LAWS OF UTAH 1983
- 61-2-10, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-11, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-12, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-13, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-17, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983
- 61-2-18, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-20, AS LAST AMENDED BY CHAPTER 257, LAWS OF UTAH 1983

61-2-22, AS ENACTED BY CHAPTER 146, LAWS OF UTAH 1963

61-2-23, AS ENACTED BY CHAPTER 254, LAWS OF UTAH 1983

61-2a-4, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

61-2a-5, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

61-2a-9, AS LAST AMENDED BY CHAPTER 256, LAWS OF UTAH 1983

*Be it enacted by the Legislature of the state of Utah:*

**Section 1. Section Amended.**

Section 61-2-1, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read:

**61-2-1. License required.**

It is unlawful for any person to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate [salesman] sales agent within this state without a license obtained under this chapter.

**Section 2. Section Amended.**

Section 61-2-2, Utah Code Annotated 1953, as last amended by Chapter 257, Laws of Utah 1983, is amended to read:

**61-2-2. Definitions.**

As used in this chapter:

(1) "Principal real estate broker" and "principal broker" means:

(a) ~~[all persons]~~ any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

(2) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (1) for valuable consideration, who has qualified under the provisions of this

1996 Utah Laws Ch. 102 (H.B. 102)  
(Publication page references are not available for this document.)

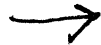
UTAH 1996 SESSION LAWS  
51ST LEGISLATURE, 1996 GENERAL SESSION

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Additions are indicated by <<+ Text +>>; deletions by  
<<- Text ->>. Changes in tables are made but not highlighted.

Ch. 102

H.B. No. 102



DIVISION OF REAL ESTATE--GENERAL AMENDMENTS

AN ACT RELATING TO THE DIVISION OF REAL ESTATE; ADDING CERTAIN DEFINITIONS;  
EXEMPTING CERTAIN PERSONS FROM LICENSING REQUIREMENTS; REVISING THE DUTIES OF  
THE REAL ESTATE COMMISSION; MODIFYING CERTAIN REQUIREMENTS FOR LICENSING;  
REVISING MANDATES IMPOSED ON BROKERS; CREATING A CAUSE OF ACTION FOR  
MISHANDLING OF TRUST FUNDS; AND MAKING TECHNICAL CORRECTIONS.

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 61-2-1 is amended to read:

<< UT ST § 61-2-1 >>

61-2-1. License required

<<+(1)+>> It is unlawful for any person to engage in the business, act in the  
capacity of, advertise, or assume to act as a principal real estate broker,  
associate real estate broker, or a real estate sales agent within this state  
without a license obtained under this chapter.

<<+(2) It is unlawful for any person outside the state to engage in the business,  
act in the capacity of, advertise, or assume to act as a principal real estate  
broker, associate real estate broker, or a real estate sales agent with respect to  
real estate located within the state without a license obtained under this chapter.  
+>>

Section 2. Section 61-2-2 is amended to read:

<< UT ST § 61-2-2 >>

61-2-2. Definitions

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2003 Utah Laws Ch. 264 (S.B. 198)

(Publication page references are not available for this document.)

UTAH 2003 SESSION LAWS  
55th LEGISLATURE, 2003 GENERAL SESSION

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Ch. 264 (S.B. 198)

WEST'S NO. 344



DIVISION OF REAL ESTATE- DEFINITIONS AMENDMENTS

This act modifies the Securities Division--Real Estate Division section of the Utah Code. The act establishes that a real estate sales agent may be engaged either as an independent contractor or as an employee of a licensed principal real estate broker. The act establishes that the relationship between a sales agent and broker is an independent contractor relationship unless there is clear and convincing evidence that the relationship was intended by the parties to be an employer employee relationship. The act makes technical changes to the renewal of a principal broker's, associate broker's, or sales agent's license. The act makes technical changes to the process of activating an inactive license.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

61-2-2, as last amended by Chapter 106, Laws of Utah 1997

61-2-9, as last amended by Chapter 351, Laws of Utah 1997

ENACTS:

61-2-25, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 61-2-2 is amended to read:

<< UT ST § 61-2-2 >>

§ 61-2-2. Definitions.

As used in this chapter:

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2005 Utah Laws Ch. 199 (S.B. 172)

**(Publication page references are not available for this document.)**

authority related to licensing including outlining procedures in case of a denial of license; addressing post-revocation hearings and ability to apply for a new license; providing that certain fees are nonlapsing; modifying qualifications for licensure related to criminal history; addressing renewal of licensing; requiring reporting of changes; addressing lending manager licenses; addressing prohibited conduct including adding title insurance agent in the list of capacities that a licensee cannot engage in with respect to the same residential mortgage loan transaction; clarifying language applicable to disciplinary action and adjudicative proceedings; and extending the implementation of the principal lender manager licensing; and makes technical changes.

This bill provides an effective date.

Utah Code Sections Affected:

AMENDS:

61-2-5.5, as last amended by Chapters 102 and 243, Laws of Utah 1996

61-2-6, as last amended by Chapter 90, Laws of Utah 2004

61-2-7.1, as last amended by Chapter 86, Laws of Utah 2000

61-2-9, as last amended by Chapter 129, Laws of Utah 2004

61-2-11, as last amended by Chapter 351, Laws of Utah 1997

61-2-12, as last amended by Chapter 173, Laws of Utah 1999

61-2b-2, as last amended by Chapter 117, Laws of Utah 1999

61-2b-3, as last amended by Chapter 117, Laws of Utah 1999

61-2b-6, as last amended by Chapter 86, Laws of Utah 2000

61-2b-7, as last amended by Chapter 176, Laws of Utah 2002

61-2b-8, as last amended by Chapter 117, Laws of Utah 1999

61-2b-9, as last amended by Chapter 117, Laws of Utah 1999

61-2b-10, as last amended by Chapter 214, Laws of Utah 2001

61-2b-14, as last amended by Chapter 117, Laws of Utah 1999

61-2b-15, as last amended by Chapter 117, Laws of Utah 1999

61-2b-17, as last amended by Chapter 214, Laws of Utah 2001